

See vol. 2684
United States

Court of Appeals

for the Ninth Circuit

AMERICAN CRYSTAL SUGAR COMPANY, a
corporation,

Appellant,

vs.

MANDEVILLE ISLAND FARMS, INC., a cor-
poration, ROSCOE C. ZUCKERMAN and G. K.
EVANS,

Appellees.

Transcript of Record

In Two Volumes

Volume I
(Pages 1 to 400)

Appeal from the United States District Court
for the Southern District of California
Central Division

No. 12946

United States
Court of Appeals
for the Ninth Circuit

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corporation,

Appellant,

VS.

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* Page numbering appearing at foot of page of original Certified Transcript of Record.

In the District Court of the United States for the
Southern District of California, Central Division

No. 4643-BH

MANDEVILLE ISLAND FARMS, INC., a corpo-
ration, and ROSCOE C. ZUCKERMAN,

Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a
corporation,

Defendant.

ACTION FOR AN ACCOUNTING, DAMAGES
UNDER THE ANTI-TRUST LAWS, ETC.

Now comes plaintiffs above named and as a first
count herein alleges:

I.

The grounds upon which the jurisdiction of the
court depends are: (a) Diversity of citizenship; (b)
this is an action brought by persons injured in
their business and property by reason of acts of the
defendant forbidden in the anti-trust laws of the
United States, (15 U.S.C. §15) and brought in a
district in which the defendant is found and has
an agent.

II.

(a) Plaintiff Mandeville Island Farms, Inc., now
is and at all times herein mentioned has become a
corporation duly organized and existing under and
by virtue of the laws of and a citizen and inhabitant

of the State of California, with its principal place of [2] business in Stockton, San Joaquin County, California.

(b) Defendant American Crystal Sugar Company now is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of New Jersey, with its principal office and place of business in Denver, Colorado, and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California. Its agent designated for service of process under and by virtue of the law of the State of California regarding foreign corporations, is, J. W. Rooney of Oxnard, Ventura County, in the above entitled district and division of California.

(c) Plaintiff Roscoe C. Zuckerman now is and at all times herein mentioned has been a citizen and inhabitant of the State of California and a resident of San Joaquin County in said State.

III.

Plaintiffs Mandeville Island Farms, Inc. and Roscoe C. Zuckerman assert rights herein to relief in respect of or arising out of a series of transactions in which common questions of law and common

questions of fact arise and are involved. The said transactions involve agricultural contracts identical in practically all material matters and respects, for successive cropping seasons, each involving sugar beets to be grown and grown on Mandeville Island which is a tract of land located in California north of the 36th parallel. A sugar crop season or year as referred to herein is from August 1st of any particular year to July 31 of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences. [3]

IV.

The matter in controversy herein exceeds, exclusive of interest, costs, and attorney fees, the sum of \$3,000.00.

V.

(a) During the crop seasons 1938 to 1942, both inclusive, large acreages of agricultural land in California north of the 36th parallel were planted to sugar beets. Said sugar beets, when harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were bulky and semi-perishable and incapable of being transported over long

distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured.

(b) The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and [4] controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and no grower of sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers. The sugar manufactured from said beets was, during all of said period, sold in interstate commerce throughout the United States.

VI.

During said period above referred to, the only method of sale of marketable sugar beets used by growers of sugar beets in said area was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers.

VII.

In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturer. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacture of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to sell the raw sugar so produced not later than August 31 of the next crop year, (d) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold [5] and

to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (e) to make final settlement for all beets after the sugar manufactured from said beets had been sold in interstate commerce, but on or before August 31st of the next crop year, the price to be paid for said beets to be determined upon the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured raw sugar in interstate commerce.

VIII.

Defendant and the other manufacturers of sugar referred to herein were at all times herein mentioned growers of sugar beets and "producers on the farm" of sugar beets and "processors of sugar beets" as those respective phrases are and were used in the Sugar Act of 1937. Plaintiff is informed and believes and upon such information alleges that each of said persons received payments for the crop years 1939, 1940, and 1941 from the Secretary of Agriculture in accordance with §301 of the said Sugar Act. (7 U.S.C. 1131). Claude R. Wickard was at all times mentioned in this paragraph the duly appointed qualified and acting Secretary of Agriculture. On Dec. 2, 1940, said Secretary of Agriculture, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations duly made, did pursuant to §301d of said Sugar Act (7 U.S.C. 1131 (d)) made the following determination of the fair and reasonable price

for the 1940 and 1941 crops of sugar: (5 Fed. Reg. 5231).

“Fair and reasonable prices for the 1940 and 1941 crops of sugar beets. The requirements of subsection (d) of section 301 of the Sugar Act of 1937, as amended, shall be deemed to have been fulfilled with respect to the 1940 and 1941 California crops of sugar beets if the producer-processor shall have paid rates for any sugar beets processed by him equal to those provided in the following schedule: [6]

Percentum sucrose in beets.	Average net return per 100 lbs. of sugar				
	\$4.00	\$3.75	\$3.50	\$3.25	\$3.00
	Price per ton of sugar beets				
19.....	\$7.12	\$6.65	\$6.18	\$5.70	\$5.22
18.....	6.66	6.21	5.76	5.31	4.86
17.....	6.20	5.78	5.36	4.93	4.50
16.....	5.76	5.36	4.96	4.56	4.16
15.....	5.32	4.95	4.58	4.20	3.82
14.....	4.90	4.55	4.20	3.85	3.50

(Payments upon intermediate sugar prices and sugar content, or sugar prices or sugar content, higher or lower than those shown in the foregoing schedule, shall be on the same proportionate basis.)

Provided, however, That in no event shall the average net return used as the settlement basis be determined by averaging the net proceeds realized from the sale of sugar by more than one producer-processor: And provided further, That a haulage allowance at a rate not less than 2½ cents per mile per ton shall be granted to growers who perform such service in areas in which allowances have been agreed upon between producer-processors and growers.”

No appeal has been taken from said determination and any time to appeal has expired; it has not been modified, abrogated, cancelled, or withdrawn, but has become final. The fair and reasonable prices for sugar beets for the 1940 and 1941 California Crops are as set forth in said determination.

IX.

Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. [7] But during the crop seasons of 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were delivered and by whom the beets were manufactured into raw sugar.

X.

During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destination, and cash

discounts to customers) secured by defendant were 3.641 cents per pound while, at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .263 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel received on the average from $291\frac{1}{2}$ cents to $521\frac{1}{2}$ cents per ton more for sugar beets delivered to defendant corporation than did growers of identical beets of identical sugar content delivered to other manufacturers of beet sugar in California north of the 36th parallel.

XI.

Thereupon and some time in 1937 or 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all in violation of the anti-trust laws of the United States, and as a part of said unlawful conspiracy agreed among themselves to do and did as follows during the crop years 1939, 1940, and 1941.

(a) Each no longer competed against any of the others as to the price to be paid the growers for

sugar beets raised in California north of the 36th parallel.

(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspirators north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

(c) Each no longer competed with any of the other manufacturers of sugar north of the 36th parallel as to efficiency of sales or manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organizations of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.

(d) Instead of paying the grower of sugar beets a reasonable price for their beets, each bought beets only from growers who signed a standard printed form contract prepared by the said manufacturers and identical in all material terms. Growers either sold under said contract to one of said manufacturers

or could not sell their marketable [9] beets to anyone except for hog or cattle feed at a large loss.

(e) Said standard contract for the crop years 1939, 1940, and 1941 provided that the price to be paid the grower of sugar beets in dollars and cents for beets containing 15, 16, 18 and 19 per cent sugar (the percentages here involved) was as follows:

Net return received from sugar per cwt.	Amount to be paid to grower per ton of beets			
	19%	18%	16%	15%
5 cents.....	8.74	8.28	7.28	6.72
4¾ cents.....	8.33	7.89	6.94	6.41
4½ cents.....	7.92	7.51	6.60	6.09
4¼ cents.....	7.35	6.97	6.12	5.65
4 cents.....	6.78	6.42	5.64	5.21
3¾ cents.....	6.21	5.88	5.17	4.77
3½ cents.....	5.72	5.42	4.76	4.40
3¼ cents.....	5.31	5.03	4.42	4.08
3 cents.....			3.77*	3.49*

* For the year 1940 only.

Said standard contract gave a schedule of net returns from sugar per 100 lbs. in one-fourth cent intervals and showed the percentage of sugar content in one per cent intervals, including those above set forth, but the contract further provided that intermediate figures of net return from sugar 100 lbs. and intermediate percentages of sugar content were to be figured pro rata. Inasmuch as beets of sugar content other than 15, 16, 18 and 19 per cent are not herein involved, the schedules herein are limited to such percentages. Said prices agreed upon by defendant and its co-conspirators to be paid by them

and paid by them to plaintiff and the other growers of sugar beets in California north of the 36th parallel were not the reasonable prices for sugar beets. The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in par. VIII hereof.

VII.

Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. But during said crop seasons of 1939, 1940 and 1941, as a direct, expected and planned result of said conspiracy, there was no longer any such competition. Plaintiffs are informed and believe and, upon such information and belief, allege that defendant, as a result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said crop years than it would have had competition been free from and unrestrained by said con-

spiracy and plaintiffs did not receive the reasonable value of their sugar beets.

XIII.

As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and [11] the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated, in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar beet factories in California north of the 36th parallel but with three completely separate overheads and with none of the efficiency that consolidation into one corporation might bring.

XIV.

Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31,

1942, when the last payment was made under the 1941 standard contract and said conspiracy has been continued thereafter up to the present time in so far as defendant and each of its co-conspirators still refuse and will not make payments to any of the growers other than in accordance with the method agreed upon in said conspiracy as above set forth.

XV.

The determination of the Secretary of Agriculture under the Sugar Act of 1937 as to the fair and reasonable prices for the 1940 and 1941 California crops of sugar beets was made Dec. 21, 1940 and was published on the Federal Register on Dec. 24, 1940 as aforesaid, but, nevertheless, defendant and its said co-conspirators, each of whom took part in the said hearings held by the Secretary of Agriculture, and each of whom well knew of the determination, persisted thereafter in their said conspiracy and would not buy beets from growers in California north of the 36th parallel except under the terms and conditions set forth in said standard agreement.

XVI.

On November 14, 1938, defendant and plaintiff Mandeville Island Farms, Inc. entered into one of defendant's standard form contracts for the 1939 crop season under which defendant promised to pay said plaintiff on August 31, 1940, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part

to be performed in said contract and during the crop year 1939 delivered to defendant 22,355.6 tons of sugar beets of an average sugar content of 18.25% from Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVII.

On December 29, 1939, defendant and plaintiff Mandeville Island Farms, Inc. entered into one of defendant's standard form contracts for the 1940 crop season under which defendant promised to pay said plaintiff on August 31, 1941, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1940 delivered to defendant 25,430.3 tons of sugar beets of an average sugar content of 15.55% from said Mandeville Island, which beets were accepted by defendant and manufactured into sugar. Said plaintiff does not know when said beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. [13] Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVIII.

On June 23, 1941, defendant and plaintiff Roscoe C. Zuckerman entered into one of defendant's standard form contracts for the 1941 crop season under which defendant promised to pay said plaintiff on August 31, 1942, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1941 delivered to defendant 14,144.7 tons of sugar beets of an average sugar content of 15.47% from said Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XIX.

Defendant paid plaintiffs for their 1939, 1940 and 1941 crops of sugar beets on August 31 of 1940, 1941 and 1942, respectively, but in carrying out said conspiracy and as a part and parcel thereof, said defendant paid plaintiffs on said respective dates, not upon the price secured in interstate commerce from sugar beets delivered by plaintiffs and other growers located north of the 36th parallel to the refineries of defendant located north of the 36th parallel, as defendant had paid growers prior to the 1939 crop year and not upon the prices and the bases deter-

mined by the Secretary of Agriculture to be fair and reasonable as aforesaid; but paid them in accordance with the average net return secured in interstate commerce by all manufacturers of beet sugar with refineries in California north of the 36th parallel and in accordance with the schedule set forth in the said standard contracts. Plaintiffs are informed and believe [14] and, upon such information and belief allege that the net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north of the 36th parallel. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc. would have received at least \$105,014.60 more and plaintiff Roscoe C. Zuckerman would have received at least \$37,397.38 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damage has been paid. The exact amount that plaintiffs were damaged, as aforesaid, can only be determined by an accounting in that defendant has refused all requests and demands of plaintiffs for information on which plaintiffs could determine and could herein plead the specific amounts due to plaintiffs. Plaintiffs are entitled by virtue of paragraph 15 of the anti-trust laws of the United States (15 U.S.C. Sec. 15) to have such damages trebled.

XX.

By reason of the foregoing acts of the defendant and its said conspirators, interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid.

XXI.

Plaintiffs, in order to enforce their rights against defendant, employed the services of attorneys at law and, under the anti-trust laws of the United States (15 U.S.C. Sec. 15), are entitled to reasonable attorneys' fees, the amount of which will depend upon the amount of work necessary to be performed herein by said attorneys. [15]

XXII.

From October 10, 1942, to June 30, 1945, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendment of 16 U.S.C. Sec. 16, passed October 10, 1942 (Acts of Congress October 10, 1942, Ch. 589; 56 Stat. 781, U.S.C. 1940 ed., Sup. IV, p. 185; 15 U.S.C.A. 1944 Cum. An. P. P. Title 15, Sec. 16, p. 76), which was in full force and effect between October 10, 1942 and June 30, 1945.

And As a Second Count, plaintiff Mandeville Island Farms, Inc., alleges:

XXIII.

The ground upon which the jurisdiction of the court depends is diversity of citizenship.

XXIV.

Plaintiff refers to Pars. II, III, IV, V, VI, VII, VIII, IX, X, and subpar. e of Par. XI hereof and incorporates the same herein by reference as though here set forth in full.

XXV.

Plaintiff refers to Par. XVII hereof and incorporates the same herein by reference as though here set forth in full.

XXVI.

Commencing the latter part of December, 1940, and continuing until March, 1941, the price of raw sugar increased in value by the amount of approximately 75c per 100 lbs. and remained at said higher prices or even still higher prices for many months thereafter. Said plaintiff Mandeville Island Farms, Inc. is informed and believes and, upon such information and belief, alleges that defendant, instead of selling said sugar at the higher prices that prevailed subsequent to April 1, 1941, retained most of it and sold it subsequent to August 31, 1941, at the high prices then prevailing. Defendant did not account to nor pay said plaintiff the price provided[16] for in the contract for said sugar but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets

produced by plaintiff and other growers during the crop season of 1940 and delivered during said crop season under said standard form of contract but used the prices obtained for sugar sold from August 1, 1940 to August 31, 1941, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1940 and which was grown and delivered in previous crop seasons and which was sold by said defendant and the other manufacturers at the lower prices that prevailed from August 1, 1940 to December 31, 1940, instead of at the higher prices that prevailed when the 1940 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant, and the other manufacturers, well knowing that the price of sugar would rise prior to January 1, 1941, made various sales prior thereto after it and they had such knowledge to various purchasers so that the purchasers would reap the profits resulting from the increased price which defendant and said other corporations knew was about to occur, at the expense, detriment and loss of said plaintiff and other growers under like contracts.

XXII.

Defendant has paid to said plaintiff the sum of \$102,767.13 for 25,430.3 tons of sugar beets of 15.55% average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1940 season. Said payment, however, was, as aforesaid, based not

upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1940 crop season, but upon the sales made during the 1940 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and believes and, upon such information and belief, alleges that said [17] sales were composed mainly of sugar manufactured previous to the 1940 season from beets not produced or delivered during the 1940 season.

XXIV.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1940 season, but defendant has refused to and will not furnish and has not furnished any such accounting and plaintiff has no way or means other than by an accounting suit to secure such information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from beets delivered during the 1940 season, plaintiff would be entitled to receive under said contract at least \$30,000 more than plaintiff did receive.

XXV.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the

1940 crop at the best price obtainable but sacrificed the same as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant.

XXVI.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1940, charged as expenses various improper amounts which should not have been [18] charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff.

Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon said information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive and there would have been due to plaintiff the additional sum of at least \$5,000.00.

XXVII.

(a) In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid by plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$102,767.13 paid to plaintiff as aforesaid, was based upon 25,430.3 tons of beets of an average sugar content of 15.55% and upon an alleged net return per 100 lbs. of sugar of \$3.160. In arriving at said sum of \$102,767.13, defendant erroneously and contrary to said agreement took an intermediate sugar price of \$4.04. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.160 was correct) would be \$4.04272 instead of \$4.04. As a result, defendant underpaid said plaintiff \$.00272 per ton, or a total of \$69.27, assuming that the net return per 100 lbs. of sugar was \$3.160.

(b) Furthermore defendant calculated the amount to be paid said plaintiff Mandeville Island Farms, Inc. for the 1940 crop upon the said schedule set forth in the standard contract and not upon the said

schedules set forth in the said determination of the Secretary of Agriculture. Beets of a sugar content of 15.55%, made into sugar which returned an average of \$3.160 per 100 lbs. to the manufacturer would pay the grower \$4.255 a ton, under the said determination schedules instead of \$4.04 a ton under the standard contract schedule, a difference of 21 cents a ton or \$5,467.52 on 25,430.3 tons, which sum is due and unpaid to said plaintiff in addition to the other sums herein referred to.

And As a Third Count, plaintiff Roscoe C. Zucker-
man alleges:

XXVIII.

The ground upon which the jurisdiction of the court depends is diversity of citizenship.

XXIX.

Said plaintiff refers in Pars. II, III, IV, V, VI, VII, VIII, IX, X and subpar. e of Par. XI hereof and incorporates the same herein by reference as though here set forth in full.

XXX.

Said plaintiff refers to Par. XVIII hereof and incorporates the same herein by reference as though here set forth in full.

XXXI.

On January 1, 1942, the price of raw sugar increased substantially in price, and during the month of April, 1942, the price of sugar again increased

substantially in price and remained at said higher price for many months thereafter. Said plaintiff is informed and believes and, upon said information and belief, alleges that defendant, instead of selling said sugar on or before August 31, 1942, at the high prices that prevailed from April until August, 1942, sold but little of it and retained most of it and sold it subsequent to [20] August 31, 1942, at the high prices then prevailing. Defendant did not account to nor pay said plaintiff the price provided for in the contract for said sugar but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets produced by plaintiff and other growers during the crop season of 1941 and delivered during said crop season under said contract, but used the prices obtained for sugar sold from August 1, 1941 to August 31, 1942, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1941 and which was grown and delivered in previous crop seasons and which was sold at the lower prices that prevailed from August 1, 1941 to December 31, 1941, instead of at the higher prices that prevailed when the 1941 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant and the other sugar manufacturers, well knowing that the price of sugar would rise on January 1, 1942, made various sales prior thereto after it had such knowledge to various purchasers so that the purchasers would reap the

profits resulting from the increased price which defendant knew was about to occur, at the expense, detriment and loss of said plaintiff and other growers under like contracts.

XXXII.

Defendant has paid to said plaintiff the sum of \$74,794.76 for 14,144.7 tons of sugar beets of 15.47% average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1941 season. Said payment, however, was, as aforesaid, based not upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1941 crop season, but upon the sales made during the 1941 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and [21] believes and, upon such information and belief, alleges that said sales were composed mainly of sugar manufactured previous to the 1941 season from beets not produced or delivered during the 1941 season.

XXXIII.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1941 season, but defendant has refused to and will not furnish and has not furnished any such accounting and plaintiff has no way or means other than by an accounting suit to secure such

information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from beets delivered during the 1941 season, plaintiff would be entitled to receive under said contract at least \$30,000 more than plaintiff did receive.

XXXIV.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the 1941 crop at the best price obtainable but sacrificed the same as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant.

XXXV.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1941, charged [22] as expenses various improper amounts which should not have been charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff. Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon such information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive and there would have been due to plaintiff the additional sum of at least \$5,000.00.

XXXVI.

(a) In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid to plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$74,794.76 paid to plaintiff as aforesaid, was based upon 14,144.7 tons of beets of an average sugar content of 15.47% and upon an alleged net return per 100 lbs. of sugar of \$3.950. In arriving at said sum of \$74,794.76, defendant erroneously and contrary to said agreement

took an intermediate sugar price of \$5.29. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.950 was correct) would be \$5.32128 instead of \$5.29. As a result, defendant underpaid said plaintiff \$.03128 per ton, or a total of \$442.45, assuming that the net return per 100 lbs. of sugar was \$3.950.

(b) Furthermore, defendant calculated the amount to be paid said plaintiff Roscoe Zuckerman for the 1941 crop upon the said schedules set forth in the standard contract and not upon the said schedules set forth in the said determination of the Secretary of Agriculture. Beets of sugar content of 15.47% made into sugar which returned on an average \$3.950 per 100 lbs. to the manufacturer would pay the grower \$5.46048 a ton under the said determination schedule instead of \$5.29 as paid by defendant to plaintiff, a difference of \$.17048 a ton or \$2,411.39 on 14,144.7 tons, which sum is due and unpaid to said plaintiff in addition to the other sums referred to herein.

Wherefore, plaintiffs pray judgment against defendant as follows:

1. That defendant be required to account to plaintiffs in connection with all sugar beets delivered by plaintiffs to defendant during the crop years 1939, 1940, and 1941, and for all sugar manufactured therefrom and sold by said defendant.

2. That plaintiff Mandeville Island Farms, Inc. have judgment for the sum found to be due it by said accounting and that the amount so found due be trebled.

3. That plaintiff Roscoe C. Zuckerman have judgment for the sum found to be due him by said accounting and that the amount so found due be trebled.

4. That plaintiff Mandeville Island Farms, Inc. have judgment against the defendant for \$345,043.80 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem reasonable.

5. That plaintiff Roscoe C. Zuckerman have judgment against the defendant for \$112,192.14 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem reasonable.

6. That plaintiff Mandeville Island Farms, Inc. have judgment against the defendant for the sum of \$50,536.79 upon the second count, [24] together with interest thereon from August 31, 1941.

7. That plaintiff Roscoe C. Zuckerman have judgment against the defendant for the sum of \$47,853.64 upon the third count, together with interest thereon from August 31, 1942.

8. That plaintiffs have judgment for their costs herein involved and attorney fees.

9. That plaintiffs have such other and further relief as may be fit and proper in the premises.

/s/ WOOD, CRUMP, ROGERS and
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

Acknowledgment of service.

[Endorsed]: Filed July 30, 1945. [25]

[Title of District Court and Cause No. 4643.]

NOTICE OF MOTION TO DISMISS OR IN
THE ALTERNATIVE TO STRIKE FROM
COMPLAINT OR FOR A MORE DEFINITE
STATEMENT OR FOR A BILL OF PAR-
TICULARS

To Plaintiffs in the Above Entitled Action and to
Messrs. Wood, Crump, Rogers and Arndt, Their
Attorneys:

Please Take Notice that defendant above named
will, on Monday, October 1, 1945, at the hour of
10:00 o'clock a.m., or as soon thereafter as counsel
may be heard, move the above entitled court, in
Court Room No. 6 thereof, in the United States Court
House and Post Office Building, Los Angeles, the
Honorable Ben Harrison, Judge Presiding, as fol-
lows:

1. To dismiss the action because the complaint
fails [26] to state a claim against defendant upon
which relief can be granted.

2. To dismiss the first count attempted to be set
forth in said complaint because the same fails to
state a claim against defendant upon which relief
can be granted.

3. To dismiss said first count because the same
fails to state a claim against defendant upon which
relief can be granted under the anti-trust laws of
the United States, or any thereof.

4. To dismiss said first count because the same is

barred by the provisions of Section 359 of the Code of Civil Procedure of California.

5. To dismiss the second count attempted to be set forth in said complaint because the same fails to state a claim against defendant upon which relief can be granted.

6. To dismiss the third count attempted to be set forth in said complaint because the same fails to state a claim against defendant upon which relief can be granted.

7. In the alternative, and in the event the above motion to dismiss are for any reason denied, to strike from the complaint, because immaterial, the following parts or portions thereof:

(a) The whole of paragraph numbered VIII, pages 5, 6.

(b) The whole of paragraph number X, page 7.

(c) That part of paragraph numbered XI appearing on page 10 thereof and reading as follows:

“The reasonable price for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph VIII hereof.”

(d) The whole of paragraph numbered XV, pages 11, 12.

(e) The whole of subparagraph b of paragraph numbered XXVII, appearing on page 19 thereof.

(f) The whole of subparagraph b of paragraph numbered XXXVI, appearing on page 23 thereof.

8. In the alternative, and in the event the above motions to dismiss are for any reason denied, for a more definite statement or for a bill of particulars to enable defendant properly to prepare its responsive pleading and to prepare for trial. The defects complained of and the details desired are as follows:

(a) The failure to specify the facts, if any, warranting the conclusion of the pleader expressed in paragraph numbered VII on pages 7-8 that the purpose of the alleged conspiracy referred to in said paragraph was "to unlawfully monopolize and restrain commerce in sugar and sugar beets among the several states" or "to unlawfully fix prices to be paid the growers of sugar beets" or that the activities complained of were "all in violation of the anti-trust laws of the United States."

(b) The failure to specify the facts, if any, warranting the conclusion of the pleader expressed in paragraph numbered XIII on pages 10-11, that as "a direct, expected and planned result of said conspiracy, the free and natural flow of commerce [28] in interstate trade was intentionally hindered and obstructed."

(c) The failure to specify how, or in what manner or to what extent, or with reference to what commodity, if any, the free and natural flow of commerce in interstate trade was intentionally or otherwise hindered or obstructed, as alleged.

(d) The failure to specify any facts warranting the inference or finding that the activities com-

plained of in any way restrained or otherwise affected interstate commerce.

(e) The failure to specify any facts warranting the inference or finding that the damages assertedly suffered by plaintiffs or either of them, resulted proximately or at all from any act or acts prohibited by the anti-trust laws of the United States.

Said latter motion will be made upon the ground that none of the foregoing matters are alleged with sufficient definiteness or particularity to enable defendant properly to prepare its responsive pleading or to prepare for trial.

In order to facilitate the presentation, consideration and discussion of the foregoing motions, and inasmuch as defendant does not understand that there is any controversy between the parties as to form or terminology of the standard form contracts referred to in the complaint, there are hereunto annexed, marked respectively Exhibits A, B, and C and made a part hereof, specimens of the same for the crop years 1939, 1940 and 1941.

Dated: September 15, 1945.

O'MELVENY & MYERS,
PIERCE WORKS, JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant. [29]

MEMORANDUM OF POINTS AND AUTHORITIES

I. Motion to Dismiss—Count I

1. The primary question presented is whether or not, assuming for the purposes of the motion the existence of the conspiracy alleged, such conspiracy had the purpose or effect of suppressing or restraining competition in interstate commerce either by monopolizing the supply of an interstate commodity, or controlling its price, or otherwise controlling the market to the detriment of purchasers or consumers of such commodity.

2. A subordinate question is whether or not the damages asserted by plaintiffs resulted naturally and proximately from any act or acts, such as above outlined, prohibited by the anti-trust laws.

A. The Commodities Involved

3. The commodities involved are sugar and sugar beets. Plaintiffs are sugar beet growers; defendant is a purchaser and processor of the beets, from which it manufactures beet sugar. The sugar, after its manufacture, moves in interstate commerce; the sugar beets, it is important to note, do not. They are grown, harvested, delivered to defendant and processed by the defendant into sugar wholly within the boundaries of the State of California.

Complaint, Par. V (a), p. 3. [30]

B. Nature and Alleged Results of the Asserted Conspiracy or Combination

4. Apparently due to the fact that there are no

other beet sugar manufacturers in California north of the 36th parallel (which roughly approximates the northern boundary line of San Luis Obispo, Kern and San Bernardino Counties) it is charged that defendant and two other processors have a monopoly as to the manufacture of sugar in that area. The complaint then charges a conspiracy, assertedly to unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all, it is said, in violation of the anti-trust laws of the United States by agreeing to do and doing the following enumerated overt acts during the crop years 1939, 1940 and 1941:

(1) Ceasing to compete against each other as to the price to be paid the beet growers;

(2) Paying the same price to all beet growers for their beets, determining the price upon the average net returns to the manufacturers from the sugar manufactured by them;

(3) Failing to compete as to the efficiency of their respective sales and manufacturing organizations; whereby, regardless of the price at which sugar was sold, all growers were paid the same price for their beets.

(4) Refusing to buy beets from any grower unless he signed a standard form contract identical in terms with those of the other two manufacturers. (See Exhibits A, B and C hereunto attached.) [31]

(5) Paying all beet growers upon the average net return basis mentioned above in subparagraph (2) instead of upon the reasonable price as determined by the Secretary of Agriculture under the Sugar Act (7 U.S.C. 1131) thereby depriving the growers of the reasonable value of their beets.

Complaint, Pars. V(b) ; XI, pp. 3-4, 7-10.

5. As a result of the asserted conspiracy, it is said that the members thereof failed to compete as to efficiency in their various departments whereby they received less in sales returns and incurred more expense, wherefore plaintiffs did not receive the reasonable value of their beets. It is further said that the free flow of interstate commerce was thereby hindered and obstructed, competition was frustrated and the net effect was as if the three manufacturers were in reality one, without, however, the efficiency that consolidation into one corporation would bring.

Complaint, Par. (numbered) VII, XIII, pp. 10-11.

6. At this point it is material to point out that the gist of the asserted conspiracy relates solely to an asserted fixing of the price of sugar beets, which are bought and sold solely in intra-state commerce. The complaint of these plaintiffs amounts to no more than an assertion that because of this, they were deprived of the reasonable value of their sugar beets. At the same time, it is equally worthy of note that the complaint does not even pretend to allege that

any of the acts assertedly done or omitted to be done by the alleged conspirators in any way affected the free flow in interstate commerce of the sugar manufactured from these beets, either by way of affecting its price, or the available supply thereof in interstate commerce, or otherwise. In this regard particular emphasis should be laid on the allegation in paragraph XI(c) page 8, that regardless of the price at which the sugar was sold, the beet grower received the same price. This is an outright admission that the asserted conspiracy in no way affected the only commodity entering the flow of interstate commerce.

C. Applicable Principles of Law

7. In order to state a cause of action under the anti-trust laws, it is necessary to show that the activities complained of either had or were intended to have a direct effect upon prices of the interstate commodity—here sugar, as distinguished from the sugar beets—or otherwise to deprive purchasers or consumers of the sugar of the advantages which they would derive from free competition; and no such showing has been made.

Apex Hosiery Co. v. Leader, 310 U.S. 469,
500-502.

Chicago Board of Trade v. U. S., 246 U.S.
231, 238.

U. S. v. U. S. Steel Co., 251 U.S. 417.

U. S. v. International Harvester Co., 224 U.S.
693.

Appalachian Coals v. U. S., 288 U.S. 344, 375.

8. The production and manufacture of goods or commodities is not commerce, nor does the fact that the same are intended to be shipped in interstate commerce after their manufacture make them a part thereof. Interstate Commerce begins by the actual delivery of the manufactured commodity—here the sugar—to a carrier for transportation or the actual commencement of its transfer to another state. [33]

Hopkins v. U. S., 171 U.S. 578, 588, 591-592.

United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 407-8, 410-13.

United Leather Workers v. Herkert etc. Trunk Co., 265 U.S. 457, 471.

Industrial Assn. v. U. S., 268 U.S. 64, 82.

Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 107.

Hammer v. Dagenhart, 247 U.S. 251.

D. L. & W. R.R. Co. v. Yurkonis, 238 U.S. 439.

Coe v. Errol, 116 U.S. 517, 525, 528.

Kidd v. Pearson, 128 U.S. 1.

Capital City Dairy Co. v. Ohio, 183 U.S. 238, 245.

McCluskey v. Marysville & N. Ry. Co., 243 U.S. 46.

Arkadelphia Co. v. St. L. S.W. Ry., 249 U.S. 134.

Crescent Oil Co. v. Mississippi, 257 U.S. 129.

9. The foregoing statements apply as fully to sugar as to any other commodity. Interstate commerce does not begin until the sugar is manufactured and shipped; and nothing done or omitted to be

done with reference to the production or manufacture of the sugar may be said to have the direct effect upon commerce condemned by the anti-trust acts.

U. S. v. E. C. Knight Co., 156 U.S. 1, 12, 13, 16-17.

Utah-Idaho Sugar Co. v. Federal Trade Com., 8 Cir. 22 Fed. (2d) 122, 125-6.

U. S. v. Great Western Sugar Co., D.C. Neb., 39 Fed. (2d) 149.

10. That the interference with interstate commerce condemned by the anti-trust laws must be direct and not remote or conjectural, is well settled.

See authorities above; also

McJunkin v. Richfield Oil Co., N.D. Cal., 33 Fed. Supp. 466.

Gable v. Vonnegut Mach. Co., 6 Cir., 274 Fed. 66.

Boro Hall Corp. v. Genl. Motors Corp., D.C. N.Y. 37 Fed. Supp. 999.

11. The requirement that the interference be direct and not remote is especially necessary where, as here, the injury claimed only relates to the plaintiffs' business in its intra-state aspects. An alleged conspiracy which is aimed at restraining a local enterprise and which only indirectly or incidentally affects and restrains interstate commerce is not within the purview of the anti-trust laws.

Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 Fed. (2d) 742, 753-4.

Abonaf v. J. D. & A. B. Spreckels Co., N.D. Cal., 26 Fed. Supp. 830, 833.

Compare:

U. S. v. Patten, 226 U.S. 525.

Field v. Barber Asphalt Paving Co., 194 U.S. 618.

Lynch v. Magnavox Co., Inc., 9 Cir., 94 Fed. (2d) 883.

Lipson v. Socony-Vacuum Corp., 1 Cir., 76 Fed. (2d) 213.

12. Only those damages may be recovered in an anti-trust suit which are the proximate result of a violation of the anti-trust laws. It is not enough to allege something ostensibly forbidden by those laws and claim general damages arising therefrom. [35]

McJunkin v. Richfield Oil Corp., N.D. Cal., 33 Fed. Supp. 466.

Sullivan v. Associated Billposters, D.C. N.Y., 272 Fed. 323.

Westmoreland Asbestor Co. v. Johns-Mansville, 30 Red. Supp. 389.

Gerli v. Silk Assn., D.C. N.Y., 36 Fed. (2d) 959.

Twin Ports Oil Co. v. Pure Oil Co., D.C. Minn. 46 Fed. Supp. 149.

Miller Oil Co. v. Socony-Vacuum Oil Co., 37 Fed. Supp. 831.

13. Defendant is not advised as to whether plaintiffs intend to assert that even though no violations of the anti-trust acts have been shown, the facts al-

leged nevertheless state a claim upon which relief could be granted under the California anti-monopoly statute. (Cartwright Act, Calif. Stats. 1907, p. 984, as amended by Stats. 1909, p. 593; recodified as Business and Professions Code Secs. 16720-16726, 16750-16758.) A somewhat similar situation was considered in the Alabama case of Dothan Oil Mill Co. v. Espy, 127 So. 178, which very closely resembled the present case on the facts. However, there are two sufficient answers to such a contention.

14. Both this Court and the appellate courts of California have held the Cartwright Act unconstitutional in that it provides no fixed standard of guilt, due to the "reasonable profit" exceptions embodied in the amendment of 1909. (See Bus. & Prof. Code, sec. 16723.)

Blake v. Paramount Pictures, (S.D. Cal.) 22
Fed. Supp. 249. [36]

Ward v. Auctioneers' Ass'n, 67 A.C.A. 194.

Compare:

Cline v. Frink Dairy, 274 U.S. 445.

15. In any event, any cause of action under the Cartwright Act for activities during 1939, 1940 or 1941 were barred three years after the creation of any liability thereunder.

California Code of Civil Procedure, Sec. 359.

II. Motion to Dismiss—Counts II and III

16. The questions presented by Counts II and III relate entirely to the construction of the form con-

tracts between the parties, Exhibits A, B and C attached. They are:

(a) Was defendant obligated to pay plaintiffs, for beets purchased by it from plaintiffs during a particular crop year, upon the basis of the sales of sugar manufactured from those particular beets, or upon the basis of sugar sold during such crop year, irrespective of when the beets going to make up such sugar were raised?

(b) Was defendant obligated to sell at "the best price obtainable" or at current market prices?

(c) Was defendant justified in charging against sales of sugar during a current crop year, in arriving at its net return for such year, insurance, personal property taxes and costs of reconditioning sugar from previous crops sold during such crop year?

(d) May plaintiffs now attack the final settlement under the contracts without a proper showing of either fraud [37] or mistake?

(e) Is not the determination of a reasonable price for sugar beets by the Secretary of Agriculture merely a condition precedent to his making payments under the Sugar Act?

17. In order that the Court may have before it the form contract upon which the solution of these questions depends, we have annexed Exhibits A, B, and C hereto for reference in this connection. It is submitted that this course is proper.

Rules 6 (d), 7 (b), 12 (b), 43 (e).

Weeks v. Bareco Oil Co., (7 Cir.) 125 Fed.

(2) 84.

Victory v. Manning, (3 Cir.) 128 Fed. (2d) 415.

Gallup v. Caldwell (3 Cir.) 120 Fed. (2d) 90.

Central Mexico Light & Power Co. v. Munch (2 Cir.) 116 Fed. (2d) 85.

1 Moore, Fed. Pr. (1938), p. 645, et seq.

Same, 1944 Cum. Supp., p. 666, et seq.

B. Construction of the Contracts

18. Defendant was obligated under the contracts involved to pay plaintiffs upon the basis of sugar sold during a particular crop year, irrespective of when the beets going to make up the same were raised.

In this regard the contracts provide that the price per ton for beets delivered "hereunder" shall be determined upon the average net returns received "for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1" of the crop year involved, and based upon the sugar content, etc. In view of this language, plaintiffs' position [38] that they should be paid on returns from sugar manufactured from the beets delivered during a particular crop year, irrespective of when the same were manufactured into sugar or the sugar sold, plainly is not tenable. The terms of the contract are clear; the test is average net returns from (a) sugar manufactured north of the 36th parallel, (b) and sold during the twelve months' period specified. It is submitted that to hold otherwise would be to rewrite the contract of the parties.

19. Sales by defendant of the sugar involved at current market prices was a full compliance with the contract.

It is apparent from the complaint (see for instance, paragraph numbered XXVI at pp. 15-16) that all sugar was sold at current market prices. Plaintiffs' complaint seems to be that it was not sold at the right time. We search the contract in vain for any provision requiring the sugar to be sold at any particular time or in any particular quantities or at any price whatever. Obviously sales at the current market were a full and fair compliance with the contract.

20. No showing has been made that the defendant's method of arriving at its net return was improper and in any event the contracts provide that the determination of the Certified Public Accountant shall be final.

Plaintiffs attack certain charges made against gross returns for insurance, taxes and reconditioning of sugar sold during a given crop year, but harvested in previous years. Again we must reiterate that there is nothing in the contract requiring sugar from a specified crop to be sold at any particular time. [39]

In addition to this, the contract provides (a) that there may be "deducted from the gross sales price all such charges and expenditures as are regularly and customarily deducted from the gross price of sugar," in accordance with established methods of accounting, and (b) that the determination of the Certified Public Accountant determining the net re-

turns (after these deductions, of course) shall be final.

Plaintiffs have pleaded nothing to show that the deductions in question were not such as are regularly and customarily made, nor have they suggested any theory upon which they may now attack the finality of the Certified Public Accountant's decision.

21. The final settlements under the contracts may not now be attacked in the absence of a proper showing of fraud or mistake; and none has been made.

The claims in this regard seem to relate to what are asserted to be arithmetical errors. If plaintiffs' assumptions are correct, we trust that we may be permitted to observe that such mistakes could no doubt be rectified without the necessity of resorting to the anti-trust laws.

Under the circumstances, however, we deem it proper to point out that the contracts provided for a final settlement not later than August 31st of each succeeding year. The complaint does not negative the fact that such settlements were had. Such being the case, under settled principles plaintiffs may not be permitted to reopen those final settlements in the absence of a showing of either fraud or of such mistake as would warrant relief in equity. Mere mathematical error innocently made, and open to discovery by the exercise of diligence by either party, is no ground for relief in equity. (See, for instance, *Ariss-Knapp Co. v. County of Sonoma*, 73 Cal. App. 262, 267.) Here, however, plaintiffs do not seek equitable relief; they are attempting to ignore the settle-

ment feature of the contract and proceed as if it had no existence. This, of course, they may not do.

22. The determination of a reasonable price for sugar beets by the Secretary of Agriculture is merely a condition precedent to his making payments under the Sugar Act.

All through the complaint plaintiffs lay stress upon the determination by the Secretary of Agriculture of a fair and reasonable price for sugar beets under the Sugar Act as being controlling and absolute. Recourse to the Act, however (7 U.S. C.A. Secs. 1100, et seq., particularly Sec. 1131 and subsec. (d) thereof) reveals that such determination by the Secretary is merely a condition precedent for the payment by him of benefits to certain producers and processors of sugar beets. Other conditions, for instance, are no child labor, proper wage standards, proportionate share production and proper soil preservation. Such being the case, we have moved to strike all allegations regarding the Secretary's determination as being wholly immaterial, both for the above reason and for the further reason that here we are dealing with duly executed contracts providing their own contract price.

Indeed, if we follow plaintiffs' thesis to its logical conclusion, they themselves have supplied a further ground of immateriality in this regard. The complaint alleges, on information and belief, that this defendant received payments under the Act. If we assume this statement to be true, plaintiffs are met with the provisions of Section 1136 of the Act, which

provide that the facts constituting the basis of any payment made (among which bases are, of course, the determination that the prices paid by the processor were reasonable) shall be reviewable only by the Secretary, and his determinations with respect thereto shall be final and conclusive.

It follows that, on plaintiffs' own theory of the case, they may not attack the reasonableness of defendants' prices paid for beets during the years 1939, 1940 and 1941 unless and until they have exhausted such administrative remedies before the Secretary as are reserved to them by the Act.

It is respectfully urged that for the reasons hereinabove set forth, the motions presented herewith should be granted.

Respectfully submitted,

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant. [42]

Affidavit of Service attached.

[Endorsed]: Filed Sept. 15, 1945.

[Title of District Court and Cause No. 4643]

STIPULATION AND ORDER

Whereas, in oral argument on November 13, 1945, on the motion of defendant to dismiss, etc., Hon. Ben Harrison, the United States District Judge before whom said matter was argued, stated from the bench to counsel herein that he felt that the first cause of action, if supplemented by copies of the contracts attached to the defendant's motion to dismiss, would not state facts sufficient to constitute a cause of action, and suggested that it would be a tremendous saving of time and expense if the complaint were amended (a) by setting forth copies of the agreements involved in the first count, (b) by eliminating what the Court considered an ambiguity in the complaint, and (c) by the parties entering into a stipulation to eliminate from the pleadings, for the purpose of the appeal only and without prejudice to the rights of the plaintiffs, the second and third causes of action, so as to enable the Court herein to pass upon the sufficiency of the first count on its merits and, further, [47] to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient;

Now, Wherefore, the parties stipulate, without plaintiffs' waiving their rights under the second and third counts and without prejudice to any of plaintiffs' rights thereunder, as follows, to-wit:

1. Plaintiffs will file an amended complaint herein, attaching copies of the forms of contract in use in

1938, 1939, 1940 and 1941, and omitting the second and third counts.

2. Said omission of the said second and third counts shall be without prejudice to any of the rights of the plaintiffs as to any cause or causes of action included or includable therein by amendment, and shall not be a retraxit or a dismissal with prejudice.

3. Defendant herein waives, for the period of time hereinafter set forth, any and all statutes of limitations now or hereafter applicable to the second or third causes of action or any matters therein set forth or includable therein by amendment, and waives the defense of laches as to the second and third causes of action or any matters therein set forth or includable therein by amendment.

4. Plaintiffs may, at any time prior to six months after the decision on appeal as to the sufficiency of the first count has become final, either amend the amended complaint herein by realleging said second and third counts or any portion of either, or, at any time during said period, file a separate action or actions setting forth said second and third counts or any portion of either, all with the same force and effect as if said second and third counts were continuously included herein as second and third counts from the date of the commencement of this action.

5. The waiver of the statute of limitations and of the defense of laches herein set forth, and the stipulation permitting the amendment of the amended complaint or the filing of a separate [48] action or actions hereinabove set forth, shall continue until six months

after the determination on appeal as to the sufficiency of the first count has become final.

Read, Considered and Signed this 14th day of November, 1945.

WOOD, CRUMP, ROGERS & ARNDT,
/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

[Seal] AMERICAN CRYSTAL SUGAR
COMPANY,
Defendant,

/s/ By W. N. WILDE,
Its President.

/s/ By [Illegible]
Its Secretary.

It Is So Ordered.

/s/ BEN HARRISON,
United States District Judge.

[Endorsed]: Filed Nov. 26, 1945. [49]

[Title of District Court and Cause No. 4643]

AMENDED COMPLAINT

Now come plaintiffs above named and with leave of court first had and obtained, file their Amended Complaint, and for cause of action allege:

I.

The grounds upon which the jurisdiction of the court depends are: (a) Diversity of citizenship; (b) this is an action brought by persons injured in their business and property by reason of acts of the defendant forbidden in the anti-trust laws of the United States, (15 U.S.C. Sec. 15) and brought in a district in which the defendant is found and has an agent.

II.

(a) Plaintiff Mandeville Island Farms, Inc. now is and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of California, with its principal place of business in Stockton, San Joaquin County, California.

(b) Defendant American Crystal Sugar Company now is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of New Jersey, with its principal office and place of business and executive departments in Denver, Colorado and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California. Its agent desig-

nated for service of process under and by virtue of the law of the State of California regarding foreign corporations, is, J. W. Rooney of Oxnard, Ventura County, in the above entitled district and division of California.

(c) Plaintiff Roscoe C. Zuckerman now is and at all times herein mentioned has been a citizen and inhabitant of the State of California and a resident of San Joaquin County in said State.

III.

(a) Plaintiffs Mandeville Island Farms, Inc. and Roscoe C. Zuckerman assert rights herein to relief in respect of or arising out of a series of transactions in which common questions of law and common questions of fact arise and are involved. The said transactions involve agricultural contracts identical in practically all material matters and respects, for successive cropping seasons, each involving sugar beets to be grown and grown on Mandeville Island which is a tract of land located in California north of the 36th parallel.

(b) Said Mandeville Island at all times herein mentioned contained large areas of land suitable in composition, drainage, irrigation, location, climate and transportation facilities for the successful raising of sugar beets suitable for processing into sugar. At all times herein mentioned plaintiffs have had supplies, equipment, tools, personnel, labor, organization, and knowledge adequate for the successful raising on Mandeville Island of sugar beets suitable for processing into raw sugar.

(c) A sugar crop season or year as referred to herein is from August 1st of any particular year to July 31st of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences.

IV.

The matter in controversy herein exceeds, exclusive of interest, costs, and attorney fees, the sum of \$3,000.00.

V.

On September 11, 1939, the second world war broke out and thereafter and up to December 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defenses against its possible entry into said conflict. On December 7, 1941 the Japanese attacked the United States at Pearl Harbor. This was followed by declaration of war between the United States and all the members of the Axis. At all times from September 11, 1939, the sugar beet industry was and now is one of the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continues. The various steps involved in the production and protection of beet sugar, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar and the sale

and distribution of sugar in interstate commerce to the ultimate consumer, were at all times herein mentioned and now [52] are inextricably intermingled with and directly affected by each other and have an immediate relation on each other. Each of said steps was at all times herein mentioned and now is a part of a transaction that commenced when the ground was prepared for planting the sugar beet seed and was completed when the sugar was used by the ultimate consumer.

VI.

(a) During the crop seasons 1938 to 1942, both inclusive, large acreages of agricultural land in the United States, including that portion of California north of the 36th parallel, Utah, Colorado, Michigan, Idaho, Illinois, Arizona and other states were planted to sugar beets. Said sugar beets, when harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not har-

vested, and it was necessary to harvest them promptly when matured.

(b) The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area in California which manufactured sugar beets into sugar, and no grower of sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers.

(c) The sugar manufactured from said sugar beets was, during all of said period, sold in interstate commerce throughout the United States.

(d) After the raw sugar had been produced, it was impossible to distinguish the manufactured beet sugar manufactured from sugar beets grown in any

one part of the United States from that manufactured from sugar beets grown in any other part of the United States.

(e) During said period above referred to, the only sugar beet seeds available in said portion of California were those securable from one of said three manufacturers and the only method of sale of marketable sugar beets used by growers of sugar beets in said area of California was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets. [54]

VII.

In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturer. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that

were diseased, wilted or not suitable for the manufacture of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured raw sugar in interstate commerce.

VIII.

Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined under the contracts by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. Attached hereto and marked Exhibit "A" is a copy of the standard contract for the crop season of 1938. It is incorporated herein by reference. But during the crop seasons of [55] 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed

contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were delivered and by whom the beets were manufactured into raw sugar.

IX.

Thereupon and some time in 1937 or 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all in violation of the anti-trust laws of the United States, and as a part of said unlawful conspiracy agreed among themselves to do and did as follows during the crop years 1939, 1940, and 1941.

(a) Each no longer competed against any of the others as to the price to be paid the growers for sugar beets raised in California north of the 36th parallel.

(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspira-

tors north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

(c) Each no longer competed with any of the other manufacturers of sugar north of the 36th parallel as to efficiency of sales or manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organization of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.

(d) Instead of paying the growers of sugar beets a reasonable price for their beets, each of said conspirators furnished seeds to, entered into contracts with and bought seeds only from growers who signed a standard printed form of contract prepared by said manufacturers, identical in all material terms. Farmers contemplating or desirous of growing sugar beets either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a market to sell their marketable beets except for hog or cattle feed at a large loss. Attached hereto and marked Exhibits "B", "C" and "D", respectively, are the said standard printed form contracts for the crop years 1939, 1940 and 1941.

(e) Said prices agreed upon by defendant and its co-conspirators to be paid by them and paid by them to plaintiffs and other sugar beet growers in California north of the 36th parallel and set forth in said Exhibits "B", "C" and "D" are not the reasonable prices for sugar beets. The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof.

X.

Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales [57] and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant were 3.641 cents per pound while, at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .265 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel who had contracted with defendant re-

ceived on the average from 29½ cents to 52½ cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of identical beets of identical sugar content delivered to the other manufacturers of beet sugar in California north of the 36th parallel.

XI.

During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer any such competition between the conspirators. Plaintiffs are informed and believe and upon such information and belief allege that defendant, as a result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said crop years than it would have had competition been free from and unrestrained by said conspiracy and plaintiffs did not receive the reasonable value of their sugar beets.

XII.

As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and

obstructed, and, instead of defendant and the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated, in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar beet factories in California north of the 36th parallel but with three completely separate overheads and with none of the efficiency that consolidation into one corporation might bring.

XIII.

Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract and said conspiracy has been continued thereafter up to the present time in so far as defendant and each of its co-conspirators still refuse and will not make payments to any of the growers other than in accordance with the method

agreed upon in said conspiracy as above set forth, and will not furnish any of the growers the individual, as contrasted with the pooled, sales return of the particular manufacturer with whom said grower dealt. Plaintiffs herein demanded in writing such information of defendant but defendant refused to and has not furnished the same.

XIV.

(a) Defendant and the other manufacturers of sugar referred to herein were at all times herein mentioned growers of sugar beets and "producers on the farm" of sugar beets and "processors of sugar beets" as those respective phrases are and were used in the sugar Act of 1937. Plaintiff is informed and believes and upon such information alleges that each of said persons received payments for the crop years 1939, 1940, and 1941 from the Secretary of Agriculture in accordance with Sec. 301 of the said Sugar Act. (7 U.S.C. 1131.) Claude R. Wickard was at all times mentioned in this paragraph the duly appointed, qualified and acting Secretary of Agriculture. On December 2, 1940, said Secretary of Agriculture, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations duly made, did pursuant to Section 301d of said Sugar Act (7 U.S.C. 1131 (d)) made the following determination of the fair and reasonable price for the 1940 and 1941 crops of sugar: (5 Fed. Reg. 5231)

"Fair and reasonable prices for the 1940 and 1941

crops of sugar beets. The requirements of subsection (d) of section 301 of the Sugar Act of 1937, as amended, shall be deemed to have been fulfilled with respect to the 1940 and 1941 California crops of sugar beets if the producer-processor shall have paid rates for any sugar beets processed by him equal to those provided in the following schedule: [60]

Percentum sucrose in in beets	Average net return per 100 lbs. of sugar				
	\$4.00	\$3.75	\$3.50	\$3.25	\$3.00
	Price per ton of sugar beets				
19.....	\$7.12	\$6.65	\$6.18	\$5.70	\$5.22
18.....	6.66	6.21	5.76	5.31	4.86
17.....	6.20	5.78	5.36	4.93	4.50
16.....	5.76	5.36	4.96	4.56	4.16
15.....	5.32	4.95	4.58	4.20	3.82
14.....	4.90	4.55	4.20	3.85	3.50

(Payments upon intermediate sugar prices and sugar content, or sugar prices or sugar content, higher or lower than those shown in the foregoing schedule, shall be on the same proportionate basis.)

Provided, however, That in no event shall the average net return used as the settlement basis be determined by averaging the net proceeds realized from the sale of sugar by more than one producer-processor: And provided further, That a haulage allowance at a rate not less than 2½ cents per mile per ton shall be granted to growers who perform such service in areas in which allowances have been agreed upon between producer-processors and growers."

(b) No appeal has been taken from said determination and any time to appeal has expired; it has not been modified, abrogated, cancelled, or with-

drawn, but has become final. The fair and reasonable prices for sugar beets for the 1940 and 1941 California crops are as set forth in said determination.

(c) The said determination of the Secretary of Agriculture under the Sugar Act of 1937 as to the fair and reasonable prices for the 1940 and 1941 California crops of sugar beets was made December 21, 1940 and was published in the Federal Register on December 24, 1940 as aforesaid, but, nevertheless, defendant and its said co-conspirators, each of whom took part in the said hearings held by the Secretary of Agriculture, and each of whom well knew of the determination, persisted thereafter in their said conspiracy and would not buy beets from growers in California north of the 36th parallel except under the terms and conditions set forth in said standard agreement.

XV.

On November 14, 1938, defendant and plaintiff Mandeville Island Farms, Inc. entered into one of defendant's standard form contracts for the 1939 crop season under which defendant promised to pay said plaintiff on August 31, 1940, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1939 delivered to defendant 22,355.6 tons of sugar beets of an average sugar content of 18.25% from Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar.

Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVI.

On December 29, 1939, defendant and plaintiff Mandeville Island Farms, Inc. entered into one of defendant's standard form contracts for the 1940 crop season under which defendant promised to pay said plaintiff on August 31, 1941, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1940 delivered to defendant 25,430.3 tons of sugar beets of an average sugar content of 15.55% from said Mandeville Island, which beets were accepted by defendant and manufactured into sugar. Said plaintiff does not know when said beets were manufactured into sugar by defendant. Said information [62] is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVII.

On June 23, 1941, defendant and plaintiff Roscoe C. Zuckerman entered into one of defendant's standard form contracts for the 1941 crop season under which defendant promised to pay plaintiff on

August 31, 1942, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1941 delivered to defendant 14,144.7 tons of sugar beets of an average sugar content of 15.47% from said Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVIII.

Defendant paid plaintiffs for their 1939, 1940 and 1941 crops of sugar beets on August 31 of 1940, 1941 and 1942, respectively, but in carrying out said conspiracy and as a part and parcel thereof, said defendant paid plaintiff on said respective dates, not upon the price secured in interstate commerce from sugar manufactured from beets delivered by plaintiff and other growers located north of the 36th parallel to the refineries of defendant located north of the 36th parallel, as defendant had paid growers prior to the 1939 crop year and not upon the prices and the bases determined by the Secretary of Agriculture to be fair and reasonable as aforesaid; but paid them in accordance with the average net return secured in interstate commerce for sugar by all manufacturers of beet sugar with refineries [63] in California north of the 36th parallel and in accordance with the schedule set forth in the said standard con-

tracts. Plaintiffs are informed and believe and upon such information and belief allege that the net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north of the 36th parallel. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc. would have received at least \$105,014.60 more and plaintiff Roscoe C. Zuckerman would have received at least \$37,397.38 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damage has been paid. The exact amount that plaintiffs were damaged, as aforesaid, can only be determined by an accounting in that defendant has refused all requests and demands of plaintiffs for information on which plaintiffs could determine and could herein plead the specific amounts due to plaintiffs. Plaintiffs are entitled by virtue of paragraph 15 of the anti-trust laws of the United States (15 U.S.C. Sec. 15) to have such damages trebled.

XIX.

By reason of the foregoing acts of the defendant and its said conspirators, interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in viola-

tion of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid.

XX.

Plaintiffs, in order to enforce their rights against defendant, employed the services of attorneys at law and, under the anti-trust laws of the United States (15 U.S.C. Sec. 15), are entitled to reasonable attorneys' fees, the amount of which will depend upon the amount of work necessary to be performed herein by said attorneys.

XXI.

From October 10, 1942 to June 30, 1945, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendment of 16 U.S.C. Sec. 16, passed October 10, 1942 (Acts of Congress October 10, 1942, Ch. 589; 56 Stat. 781, U.S.C. 1940 ed., Sup. IV, p. 185; 15 U.S.C.A. 1944 Cum. An. P. P. Title 15, Sec. 16, p. 76), which was in full force and effect between October 10, 1942 and June 30, 1945.

Wherefore, plaintiffs pray judgment against defendant as follows:

1. That defendant be required to account to plaintiffs in connection with all sugar beets delivered by plaintiffs to defendant during the crop years 1939, 1940, and 1941, and for all sugar manufactured therefrom and sold by said defendant.

2. That plaintiff Mandeville Island Farms, Inc. have judgment for the sum found to be due it by

said accounting and that the amount so found due be trebled.

3. That plaintiff Roscoe C. Zuckerman have judgment for the sum found to be due him by said accounting and that the amount so found due be trebled.

4. That plaintiff Mandeville Island Farms, Inc. have judgment against the defendant for \$315,043.80 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem reasonable.

5. That plaintiff Roscoe C. Zuckerman have judgment against the defendant for \$112,192.14 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem [65] reasonable.

6. That plaintiffs have judgment for their costs herein involved and attorney fees.

7. That plaintiffs have such other and further relief as may be fit and proper in the premises.

WOOD, CRUMP, ROGERS & ARNDT,

/s/ STANLEY M. ARNDT,

Attorneys for Plaintiffs.

([66])

EXHIBIT "A"

Form 3549-D—1000

Memorandum of Agreement—Season 1938

Between Grower
and

American Crystal Sugar Company
Clarksburg Factory

For delivery of Sugar Beets at.....

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant, block, thin, cultivate, irrigate, harvest and deliver during the season of 1938, in compliance with the directions of The Company, as given from time to time, acres of sugar beets, to be grown on the following described land, to-wit:.....
.....State of California.

2. The seed to be used in growing said beets shall be furnished by The Company for the price of fourteen (14) cents per pound, which The Grower agrees to pay. Seed furnished by The Company shall not be planted upon any land not contracted to The Company. Any seed furnished by The Company and not planted shall be returned in good order to The Company, at the end of the planting season, and The Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1938.

Exhibit "A"—(Continued)

3. The Grower agrees that beets hereunder shall not be irrigated after July 15, 1938, except by written permission of The Company.

The Grower Agrees That At His Own Expense He Will Harvest and Deliver to the Company All Beets Grown by Him; Said Delivery to be Made at Such Times and in Such Quantities and to Such Place or Places As May Be Designated by the Company. All beets delivered hereunder shall be properly topped; that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt and foreign substances liable to interfere with factory work and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

5. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract, by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets, beets of less than 12% sugar, or less than 80% purity, or beets that are not suitable in the judgment of The Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

Exhibit "A"—(Continued)

In no event shall The Company be liable to The Grower for partial or complete failure of crop, or for any injury or damage to beets.

6. All sound beets grown in accordance with and under this contract shall be bought by The Company and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to The Company shall be determined upon the average net return (said net return being defined in Paragraph No. 7 hereof) per one hundred pounds of sugar received by The Company from sugar manufactured at its Clarksburg Factory, and sold by The Company during the period of twelve months commencing August 1, 1938, and based upon The Company's test of the sugar content of the individual grower's beets in accordance with the following schedule:

Percentage Sugar in Beets

Net Price
Received

for Sugar 23% 22% 21% 20% 19% 18% 17% 16% 15% 14% 13%

Value of One Ton of Beets Expressed in Dollars and Cents

5.00.....	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4.75.....	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4.50.....	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4.25.....	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4.00.....	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3.75.....	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3.50.....	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3.25.....	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval

Exhibit "A"—(Continued)

in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased according to the foregoing formula, using the immediately succeeding or preceding interval, as the case may be, as the basis for calculation, provided also that if the net return for sugar should fall below \$3.25 per hundred, in such event the price per ton of beets hereinbefore fixed by this paragraph shall be further decreased in the proportion of one per cent. (1%) for each five cents (5c) of decrease in the net return per one hundred pounds of sugar below \$3.25.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of The Company based upon The Company's test of sugar content of the individual grower's beets and The Company's estimate of the net returns to be received by it for sugar sold during the twelve months period beginning August 1, 1938. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as The Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with

Exhibit "A"—(Continued)

the terms of this contract not later than August 31, 1939.

7. The net return on sugar sold as aforesaid during said period shall be determined by deducting, from the gross sales price, selling expenses directly applicable to sugar consisting of freight, discount, brokerage, storage, shipping and handling, loss and damage, insurance, advertising, salaries, traveling expenses and sundry expenses, and also any expenses or taxes occasioned by act of law or State or Federal regulation. The Company will furnish for the inspection of growers a certified statement by certified public accountants, not connected with The Company, of the net receipts from sugar sold, in accordance with this contract.

8. Any advances by The Company to The Grower either in seed, money or otherwise, shall constitute a debt from The Grower to The Company which The Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from The Grower to The Company shall be, become and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by The Company from any initial or subsequent payments

Exhibit "A"—(Continued)

from The Company to The Grower which shall become due hereunder, or under any subsequent Beet Contract between The Company and The Grower. If the beet crop to be grown hereunder is grown on leased land payments to become due hereunder from The Company to The Grower shall be payable jointly to The Grower and the landlord unless the landlord shall have previously filed with The Company his written release in form satisfactory to The Company.

9. The Grower may, at his own expense, have representatives (weighmen, taremen and chemists) in scale house, tare room and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to The Company.

10. It is understood and agreed that if any governmental authority shall establish any restriction, allotment or quota upon the growing, production or processing of beets, or the output, transportation or sale of beet sugar, then the Company may reduce to the extent which it deems necessary the quantity of beets herein contracted for, and shall be obligated to purchase only such reduced quantity.

11. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent The Grower from the performance of this contract or The Company from utilizing the beets contracted for in the manu-

Exhibit "A"—(Continued)

facture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

12. The Company, at its sole option and election, unless notified in writing by The Grower prior to July 1, 1938 not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents per ton on The Grower's share of the beets delivered by The Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

13. No agent of The Company is authorized to make any alterations, erasures or additions to this printed form of contract.

14. This agreement shall be binding upon both The Grower, his heirs, legal representatives and assigns, and upon The Company, its successors and assigns, and shall not be transferable by The Grower without the written consent of The Company, its successors and assigns.

Executed in duplicate originals this.....day
of....., 193...

.....Grower

.....Grower

AMERICAN CRYSTAL SUGAR
COMPANY [67]

EXHIBIT "B"

Form 3549-D—1500

Memorandum of Agreement—Season 1939

Between Grower
and

American Crystal Sugar Company
Clarksburg Factory

For delivery of Sugar Beets at.....

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant, block, thin, cultivate, irrigate, harvest, and deliver during the season of 1939, in compliance with the directions of the Company, as given from time to time..... acres of sugar beets, to be grown on the following described land, to-wit:..... State of California.

2. The seed to be used in growing said beets shall be furnished by the Company for the price of fourteen cents (14c) per pound, which the Grower agrees to pay. Seed furnished by the Company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company, at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1939.

Exhibit "B"—(Continued)

3. The Grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work, and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

4. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets or beets that are not suitable in the judgment of the Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damage to beets.

5. All sound beets grown in accordance with and

Exhibit "B"—(Continued)

under this contract shall be bought by the Company and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1939, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule:

		Percentage Sugar in Beets										
Net Return Received												
for Sugar		23%	22%	21%	20%	19%	18%	17%	16%	15%	14%	13%
Value of One Ton of Beets Expressed in Dollars and Cents												
5	cents	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4¾	“	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4½	“	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4¼	“	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4	“	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3¾	“	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3½	“	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3¼	“	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased according to the foregoing formula, using the immedi-

Exhibit "B"—(Continued)

ately succeeding or preceding interval, as the case may be, as the basis for calculation, provided also that if the net return for sugar should fall below \$3.25 per hundred, in such event the price per ton of beets hereinbefore fixed by this paragraph shall be further decreased in the proportion of one per cent (1%) for each five cents (5c) of decrease in the net return per one hundred pounds of sugar below \$3.25.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received for sugar sold during the twelve months period beginning August 1, 1939. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with the terms of this contract not later than August 31, 1940.

6. The net returns as aforesaid during said period shall be determined by a Certified Public Accountant, chosen by the Companies, (whose determination

Exhibit "B"—(Continued)

shall be final) by deducting from the gross sales price all such charges and expenditures as are regularly and customarily deducted from gross sales price of sugar, in accordance with the respective Companies' established systems of accounting, showing net returns from sugar sold, after deducting also all excise, sales, and other taxes, if any, either now or hereafter imposed by act of law or state or Federal regulation.

7. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to the Company shall be, become, and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by the Company from any initial or subsequent payments from the Company to the Grower which shall become due hereunder, or under any subsequent beet contract between the Company and the Grower. If the beet crop to be grown hereunder is grown on leased land, payments to become due hereunder from the Company to the Grower shall be payable jointly to the Grower and the landlord unless the landlord shall

Exhibit "B"—(Continued)

have previously filed with the Company his written release in form satisfactory to the Company.

8. The Grower may, at his own expense, have representatives (weighmen, taremen, and chemists) in scale houses, tare room, and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to the Company.

9. It is understood and agreed that if any governmental authority shall establish any restriction, allotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent necessary or required by lawful authority the acreage of beets herein contracted for, and shall be obligated to purchase only such reduced acreage of beets.

10. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

11. The Company, at its sole option and election, unless notified in writing by the Grower prior to July 1, 1939 not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum

Exhibit "B"—(Continued)

of two cents (2c) per net ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

12. No agent of the Company is authorized to make any alterations, erasures, or additions to this printed form of contract.

13. This agreement shall be binding upon both the Grower, his heirs, legal representatives, and assigns, and upon the Company, its successors and assigns, and shall not be transferable by the Grower without the written consent of the Company, its successors and assigns.

Executed in duplicate originals this.....day
of....., 193....

.....Grower

.....Grower

AMERICAN CRYSTAL SUGAR
COMPANY

By

[68]

EXHIBIT "C"

1500—3549-D—10-39

Memorandum of Agreement—Season 1940

Between Grower
and

American Crystal Sugar Company
Clarksburg Factory

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant, block, thin, cultivate, irrigate, harvest, and deliver during the season of 1940, acres of sugar beets, to be grown on the lands described on the reverse side hereof.

2. The seed to be used in growing said beets shall be furnished by the Company for the price of fourteen cents (14c) per pound, which the Grower agrees to pay. Seed furnished by the Company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company, at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1940.

3. The Grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times

Exhibit "C"—(Continued)

and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work, and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

4. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets or beets that are not suitable in the judgment of the Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damage to beets.

5. All sound beets grown in accordance with and under this contract shall be bought by the Company and paid for by it according to the following terms and schedule of prices:

Exhibit "C"—(Continued)

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1940, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule:

Percentage Sugar in Beets

Net Return
Received

for Sugar	23%	22%	21%	20%	19%	18%	17%	16%	15%	14%	13%
Value of One Ton of Beets Expressed in Dollars and Cents											
5 cents	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4¾ "	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4½ "	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4¼ "	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4 "	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3¾ "	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3½ "	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3¼ "	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45
3 "	5.55	5.31	5.07	4.83	4.53	4.30	4.06	3.77	3.49	3.21	2.95

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in which such fluctuations occur. If sugar prices or such beets shall be increased or decreased according to the foregoing formula, using the immediately succeeding or preceding interval, as the case may be, as the basis for calculation.

Exhibit "C"—(Continued)

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received for sugar sold during the twelve months period beginning August 1, 1940. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with the terms of this contract not later than August 31, 1941.

6. The net returns as aforesaid during said period shall be determined by a Certified Public Accountant, chosen by the Companies, (whose determination shall be final) by deducting from the gross sales price all such charges and expenditures as are regularly and customarily deducted from gross sales price of sugar, in accordance with the respective Companies' established systems of accounting, showing net returns from sugar sold, after deducting also all excise, sales, and other taxes, if any, either now or hereafter imposed by act of law or state or Federal regulation.

7. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute

Exhibit "C"—(Continued)

a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to the Company shall be, become, and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by the Company from any initial or subsequent payments from the Company to the Grower which shall become due hereunder, or under any subsequent beet contract between the Company and the Grower.

8. The Grower may, at his own expense, have representatives (weighmen, tareman, and chemists) in scale house, tare room, and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to the Company.

9. It is understood and agreed that if any governmental authority shall establish any restriction, allotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent necessary or required by lawful authority the acreage of beets herein contracted for, and shall be obligated to purchase only such reduced acreage of beets.

10. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the con-

Exhibit "C"—(Continued)

trol of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

11. The Company, at its sole option and election, unless notified in writing by the Grower prior to July 1, 1940 not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents (2c) per net ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

12. The beet crop covered hereby is to be grown on land leased by the grower from..... (hereinafter called "Landowner") whose address is....., wherefore, the Company is authorized to pay....per cent of the gross amount due hereunder to the said Landowner, his heirs, personal representatives, or assigns.

13. No agent of the Company is authorized to make any alterations, erasures, or additions to this printed form of contract.

14. This agreement shall be binding upon both the Grower, his heirs, legal representatives, and assigns, and upon the Company, its successors and assigns, and shall not be transferable by the Grower without the written consent of the Company, its successors and assigns.

Exhibit "C"—(Continued)

Executed in duplicate originals this.....day
of....., 19....

.....Grower.

.....Grower.

Landowner.....

(To be signed by landowner or
agent)

AMERICAN CRYSTAL SUGAR
COMPANY

By..... [69]

EXHIBIT "D"

1500—3549-D—11-40

Memorandum of Agreement—Season 1941

Between Grower
and

American Crystal Sugar Company
Clarksburg Factory

Witnesseth, that for and in consideration of the
mutual covenants and payments hereinafter set out,
the respective parties hereto mutually undertake and
agree as follows, to-wit:

1. The Grower will prepare land for, plant, block,
thin, cultivate, irrigate, harvest, and deliver during
the season of 1941,.....acres of sugar beets,
to be grown on the lands described on the reverse
side hereof.

2. The seed to be used in growing said beets shall

Exhibit "D"—(Continued)

be furnished by the Company for the price of thirteen cents (13c) per pound, which the Grower agrees to pay. Seed furnished by the Company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1941.

3. The Grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work, and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

4. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets or beets that are not suitable in the judg-

Exhibit "D"—(Continued)

ment of the Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damage to beets.

5. All sound beets grown in accordance with and under this contract shall be bought by the Company and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1941, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule:

Percentage Sugar in Beets

Net Return
Received

for Sugar	23%	22%	21%	20%	19%	18%	17%	16%	15%	14%	13%
Value of One Ton of Beets Expressed in Dollars and Cents											
5 cents	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4¾ "	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4½ "	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4¼ "	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4 "	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3¾ "	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3½ "	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3¼ "	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45
3 "	6.00	5.74	5.48	5.22	4.90	4.64	4.39	4.08	3.77	3.48	3.19

Exhibit "D"—(Continued)

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased proportionately, using the immediately succeeding or preceding interval as the case may be, as the basis for calculation.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received for sugar sold during the twelve months period beginning August 1, 1941. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with the terms of this contract not later than August 31, 1942.

6. The net returns as aforesaid during said period shall be determined by a Certified Public Accountant, chosen by the Companies, (whose determination shall be final) by deducting from the gross sales price all such charges and expenditures as are regularly and

Exhibit "D"—(Continued)

customarily deducted from gross sales price of sugar, in accordance with the respective Companies' established systems of accounting, showing net returns from sugar sold, after deducting also all excise, sales, and other taxes, if any, either now or hereafter imposed by act of law or state or Federal regulation.

7. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to the Company, shall be, become, and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by the Company from any initial or subsequent payments from the Company to the Grower which shall become due hereunder, or under any subsequent beet contract between the Company and the Grower.

8. The Grower may, at his own expense, have representatives (weighmen, taremen, and chemists) in scale house, tare room, and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to the Company.

9. It is understood and agreed that if any governmental authority shall establish any restriction, al-

Exhibit "D"—(Continued)

lotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent necessary or required by lawful authority the acreage of beets herein contracted for, and shall be obligated to purchase only such reduced acreage of beets.

10. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

11. The Company, at its sole option and election, unless notified in writing by the Grower prior to July 1, 1941 not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents (2c) per net ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

12. The beet crop covered hereby is to be grown on land leased by the grower from.....(hereinafter called "Landowner") whose address is....., wherefore, the Company is authorized to pay....per cent of the gross amount due hereunder to the said Landowner, his heirs, personal representatives, or assigns.

Exhibit "D"—(Continued)

13. No agent of the Company is authorized to make any alterations, erasures, or additions to this printed form of contract.

14. This agreement shall be binding upon both the Grower, his heirs, legal representatives, and assigns, and upon the Company, its successors and assigns, and shall not be transferable by the Grower without the written consent of the Company, its successors and assigns.

Executed in duplicate originals this.....day
of....., 19....

.....Grower.

.....Grower.

Landowner.....

(To be signed by landowner or
agent)

AMERICAN CRYSTAL SUGAR
COMPANY

By [70]

Acknowledgment of Service attached.

[Endorsed]: Filed Dec. 1, 1945.

SUMMARIZATION OF BEET SUGAR
CONTRACTS

Exhibits 1 to 19, inclusive, of "Amendment to Answer to First Amended Complaint as Amended" are specimen copies of the contracts in force during the crop years 1939, 1940 and 1941 between the manu-

facturers who operated sugar beet factories in Southern California and the growers in said area. Exhibit 1 was the 1938-39 Imperial Valley contract of Los Alamitos Sugar Company (hereinafter called "Alamitos") and Holly Sugar Corporation (hereinafter called "Holly"). Exhibits 2, 3 and 6 were the 1939, 1940 and 1941 Holly contracts. Exhibits 4 and 7 were the 1940 and 1941 Alamitos and Holly contracts. Exhibit 5 was the 1940-41 Alamitos and Holly Imperial Valley contract. Exhibits 8, 11 and 13 were the Union Sugar Company (hereinafter called "Union") coastal contracts for 1939, 1940 and 1941. Exhibit 9 was the Alamitos contract for 1941. Exhibits 10 and 12 were the Union contracts for the Southern San Joaquin Valley for 1939 and 1940. Exhibits 14, 16 and 18 were the American Crystal Sugar Company (hereinafter called "Crystal") coastal contracts for 1939, 1940 and 1941. Exhibits 15, 17 and 19 were Crystal's 1939, 1940 and 1941 contracts for the Southern San Joaquin Valley. Contracts Exhibit 10, 12, 15, 17 and 19 were substantially the same as Crystal's Clarksburg contracts for 1939, 1940 and 1941, Exhibits B, C and D of the Amended Complaint, except that Clarksburg contracts as well as the contracts used by the other sugar companies in 1939, 1940 and 1941 in Northern California provided that the price to be paid for beets was determined by a formula in which one variable was the sugar content of the beets grown by the particular grower, and the other was the average net return received for sugar manufactured at the beet sugar factories located in California north of the 36th

parallel and sold during the period of 12 months commencing August 1 of the crop year in question, while Exhibits 10, 12, 15 and 17 provided for payment by a formula in which one of the variables was the sugar content of beets grown by the particular grower, and the other was the average net returns received for sugar manufactured by the four southernmost beet sugar companies in Southern California for sugar manufactured at their Southern California factories during said 12-month period. Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14, 16 and 18 to the "Amendment to Answer to First Amended Complaint as Amended" were substantially the same as Exhibits 10, 12, 15, 17 and 19, except that the schedules set forth therein (while substantially the same as each other) provided for a higher payment to the grower than the similar schedules in contracts Exhibits 10, 12, 15, 17 and 19, and Exhibits B, C and D above referred to.

[Title of District Court and Cause No. 4643]

NOTICE OF MOTION TO DISMISS OR IN
THE ALTERNATIVE TO STRIKE FROM
AMENDED COMPLAINT

To Plaintiffs in the Above Entitled Action and to
Messrs. Wood, Crump, Rogers & Arndt, Their
Attorneys:

Please Take Notice that defendant above named
will, on Monday, December 17, 1945, at the hour of
10:00 o'clock a.m., or as soon thereafter as counsel
may be heard, move the above entitled court, in
Court Room No. 6 thereof, in the United States Court
House and Post Office Building, Los Angeles, the
Honorable Ben Harrison, Judge Presiding, as fol-
lows:

1. To dismiss the action because the amended com-
plaint [72] fails to state a claim against defendant
upon which relief can be granted.

2. To dismiss the action because the amended com-
plaint fails to state a claim against defendant upon
which relief can be granted under the anti-trust laws
of the United States, or any thereof.

3. To dismiss the action in so far as it purports
to state a cause of action under any California
statute because the same is barred by the provisions
of Section 359 of the Code of Civil Procedure of
California.

4. In the alternative, and in the event the above
motion to dismiss is for any reason denied, to strike

from the amended complaint, because immaterial, the following parts or portions thereof:

(a) The whole of paragraph numbered XIV, pages 11-13.

(b) That part of paragraph IX appearing on page 8 thereof and reading as follows:

“The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof.”

Dated: December 7, 1945.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant. [73]

MEMORANDUM OF POINTS AND AUTHORITIES

I. Motion to Dismiss

1. In order to state a cause of action under the anti-trust laws, it is necessary to show that the activities complained of either had or were intended to have a direct effect upon prices of the interstate commodity—here sugar, as distinguished from the sugar beets—or otherwise to deprive purchasers or consumers of the sugar of the advantages which they would derive from free competition; and no such showing has been made.

Apex Hosiery Co. v. Leader, 310 U.S. 469, 500-502.

Chicago Board of Trade v. U. S., 246 U.S. 231, 238.

U. S. v. U. S. Steel Co., 251 U.S. 417.

U. S. v. International Harvester Co., 224 U.S. 693.

Appalachian Coals v. U. S., 288 U.S. 344, 375.

2. The production and manufacture of goods or commodities is not commerce, nor does the fact that the same are intended to be shipped in interstate commerce after their manufacture make them a part thereof. Interstate Commerce begins by the actual delivery of the manufactured commodity—here the sugar—to a carrier for transportation or the actual commencement of its transfer to another state.

Hopkins v. U. S., 171 U.S. 578, 588, 591-592.

United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344, 407-8, 410-13.

United Leather Workers v. Herkert etc. Trunk Co., 265 U.S. 457, 471. [74]

Industrial Assn. v. U. S., 268 U.S. 64, 82.

Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 107.

Hammer v. Dagenhart, 247 U.S. 251.

D. L. & W. R. R. Co. v. Yurkonis, 238 U.S. 439.

Coe v. Errol, 116 U.S. 517, 525, 528.

Kidd v. Pearson, 128 U.S. 1.

Capital City Dairy Co. v. Ohio, 183 U.S. 238, 245.

McCluskey v. Marysville & N. Ry. Co., 243 U.S. 46.

Arkadelphia Co. v. St. L. S. W. Ry. 249 U.S. 134.
Crescent Oil Co. v. Mississippi, 257 U.S. 129.

3. The foregoing statements apply as fully to sugar as to any other commodity. Interstate commerce does not begin until the sugar is manufactured and shipped.

U. S. v. E. C. Knight Co., 156 U.S. 1, 12, 13, 16-17.

Utah-Idaho Sugar Co. v. Federal Trade Com., 8 Cir. 22 Fed. (2d) 122, 125-6.

U. S. v. Great Western Sugar Co., D. C. Neb., 39 Fed. (2d) 149.

4. That the interference with interstate commerce condemned by the anti-trust laws must be direct and not remote or conjectural, is well settled.

See authorities above; also

McJunkin v. Richfield Oil Co., N. D. Cal., 33 Fed. Supp. 466.

Gable v. Vonnegue Mach. Co., 6 Cir., 274 Fed. 66.

Boro Hall Corp. v. Genl. Motors Corp., D. C. N. Y., 37 Fed. Supp. 999. [75]

5. The requirement that the interference be direct and not remote is especially necessary where, as here, the injury claimed only relates to the plaintiffs' business in its intrastate aspects. An alleged conspiracy which is aimed at restraining a local enterprise and which only indirectly or incidentally affects and restrains interstate commerce is not within the purview of the anti-trust laws.

Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 Fed. (2d) 742, 753-4.

Abonaf v. J. D. & A. B. Spreckels Co., N. D. Cal., 26 Fed Supp. 830, 833.

Compare:

U. S. v. Patten, 226 U.S. 525.

Field v. Barber Asphalt Paving Co., 194 U.S. 618.

Lynch v. Magnavox Co., Inc., 9 Cir., 94 Fed. (2d) 883.

Lipson v. Socony-Vacuum Corp., 1 Cir., 76 Fed. (2d) 213.

6. Only those damages may be recovered in an anti-trust suit which are the proximate result of a violation of the anti-trust laws. It is not enough to allege something ostensibly forbidden by those laws and claim general damages arising therefrom.

McJunkin v. Richfield Oil Corp., N. D. Cal., 33 Fed. Supp. 466.

Sullivan v. Associated Billposters, D.C.N.Y., 272 Fed. 323.

Westmoreland Asbestos Co. v. Johns-Manville, 30 Fed. Supp. 389.

Gerli v. Silk Assn., D.C.N.Y., 36 Fed. (2d) 959.

Twin Ports Oil Co. v. Pure Oil Co., D.C. Minn., 46 Fed. Supp. 149. [76]

Miller Oil Co. v. Socony-Vacuum Oil Co., 37 Fed. Supp. 831.

7. Defendant is not advised as to whether plaintiffs intend to assert that even though no violations of the anti-trust acts have been shown, the facts alleged nevertheless state a claim upon which relief could be granted under the California anti-mono-

poly statute. (Cartwright Act, Calif. Stats. 1907, p. 984, as amended by Stats. 1909, p. 593; recodified as Business and Professions Code Secs. 16720-16726, 16750-16758.) A somewhat similar situation was considered in the Alabama case of Dothan Oil Mill Co. v. Espy, 127 So. 178, which very closely resembled the present case on the facts. However, there are two sufficient answers to such a contention.

8. Both this Court and the appellate courts of California have held the Cartwright Act unconstitutional in that it provides no fixed standard of guilt, due to the "reasonable profit" exceptions embodied in the amendment of 1909. (See Bus. & Prof. Code, sec. 16723.)

Blake v. Paramount Pictures, (S.D. Cal.) 22 Fed. Supp. 249.

Ward v. Auctioneers' Ass'n, 67 A.C.A. 194.

Compare: Cline v. Frink Dairy, 274 U.S. 445.

9. In any event, any cause of action under the Cartwright Act for activities during 1939, 1940 or 1941 were barred three years after the creation of any liability thereunder.

California Code of Civil Procedure, Sec. 359.

10. If it be assumed (which defendant does not admit) that defendant and the other two processors of sugar beets in California north of the 36th parallel unlawfully combined or conspired to restrain interstate commerce because their standard form crop contracts for the years 1939-1941, inclusive, provided that the prices to be paid the growers for their beets should be based upon the average net return from

sugar sold by all three processors rather than upon the net return from sugar sold by the particular processor with whom the grower contracted, then plaintiffs are co-conspirators because they voluntarily entered into contracts wherein the prices for beets were fixed in violation of the anti-trust laws. Plaintiffs were under no compulsion to purchase seed from defendant and produce sugar beets on their land; they might have planted their land to any crop they chose. Hence, plaintiffs stand in *pari delicto* with defendant and are entitled to no redress.

Harriman v. Northern Securities Co. (1905),
197 U.S. 244, 49 L. Ed. 739.

Bluefields S.S. Co. v. United Fruit Co. (C.C.A.
3, 1917) 243 Fed. 1, error dismissed (1919)
248 U.S. 595, 63 L.Ed. 438.

Eastman Kodak Co. v. Blackmore (C.C.A. 2,
1921) 277 Fed. 694.

American & British Mfg. Corp. v. New Idria
Quicksilver Mining Co. (C.C.A. 1, 1923) 293
Fed. 509.

Tilden v. Quaker Oats Co. (C.C.A. 7th, 1924) 1
Fed. (2d) 160.

New Century Mfg. Co. v. Scheurer (Tex. Comm.
of App. 1932) 45 S.W. (2d) 560;

Patterson v. Imperial Window Glass Co. (1914)
91 Kans. 201, 137 Pac. 955.

See *Northwestern Oil Co. v. Socony-Vacuum Oil
Co.* (C.C.A. 7th, 1943) 138 Fed. (2d) 967, 971,
cert. denied (1944) 321 U.S. 792, 88 L.Ed.
1081. [78]

II. Motion to Strike

11. The determination of a reasonable price for sugar beets by the Secretary of Agriculture is merely a condition precedent to his making payments under the Sugar Act.

Plaintiffs lay stress upon the determination by the Secretary of Agriculture of a fair and reasonable price for sugar beets under the Sugar Act as being controlling and absolute. Recourse to the Act, however (7 U.S.C.A. Secs. 1100, et seq., particularly Sec. 1131 and subsec. (d) thereof) reveals that such determination by the Secretary is merely a condition precedent for the payment by him of benefits to certain producers and processors of sugar beets. Other conditions, for instance, are no child labor, proper wage standards, proportionate share production and proper soil preservation. Such being the case, we have moved to strike all allegations regarding the Secretary's determination as being wholly immaterial, both for the above reason and for the further reason that here we are dealing with duly executed contracts providing their own contract price.

Indeed, if we follow plaintiffs' thesis to its logical conclusion, they themselves have supplied a further ground of immateriality in this regard. The complaint alleges, on information and belief, that this defendant received payments under the Act. If we assume this statement to be true, plaintiffs are met with the provisions of Section 1136 of the Act, which

provide that the facts constituting the basis of any payment made (among which bases are, of course, the determination that the prices paid by the processor were reasonable) shall be reviewable only by the Secretary, and his determinations with respect thereto shall be final and conclusive. [79]

It follows that, on plaintiffs' own theory of the case, they may not attack the reasonableness of defendant's prices paid for beets during the years 1939, 1940 and 1941 unless and until they have exhausted such administrative remedies before the Secretary as are reserved to them by the Act.

It is respectfully urged that for the reasons hereinabove set forth, the motions presented herewith should be granted.

Respectfully submitted,

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of service attached.

[Endorsed]: Filed Dec. 8, 1945.

In the District Court of the United States
Southern District of California
Central Division

No. 4643-BH

MANDEVILLE ISLAND FARMS, INC., a corporation, and ROSCOE C. ZUCKERMAN,
Plaintiffs,
vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,
Defendant.

ORDER GRANTING MOTION TO DISMISS
AND JUDGMENT OF DISMISSAL

(Ordered, adjudged and decreed that the action be and the same hereby is dismissed.)

The defendant herein having duly moved to dismiss the above entitled action and said motion having been duly argued and submitted

It Is Ordered that said motion be and the same hereby is granted, wherefore:

It Is Ordered, Adjudged and Decreed that said action be and the same hereby is dismissed.

Dated January 14, 1946.

/s/ BEN HARRISON,
Judge.

Approved as to form pursuant to Rule 7(a)

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for plaintiffs.

Judgment entered Jan. 14, 1946. Docketed Jan. 14,
1946. Book 36, Page 454.

[Endorsed]: Filed Jan. 14, 1946. [82]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO AMENDED COMPLAINT

Now come Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman, and, pursuant to that certain Stipulation and Order herein dated November 14, 1945, and filed November 26, 1945, amends the amended complaint herein by adding thereto a Second and a Third count, as follows:

As a Second Count, plaintiff, Mandeville Island Farms, Inc., alleges:

XXII.

Said plaintiff refers to paragraphs I and XX of the First Count or cause of action and incorporates the same herein by reference as though herein set forth in full. [83]

XXIII.

Commencing the latter part of December, 1940, and continuing until March, 1941, the price of sugar increased in value by the amount of approximately 75c per 100 lbs. and remained at said higher prices

or even still higher prices for many months thereafter. Said plaintiff Mandeville Island Farms, Inc. is informed and believes and, upon such information and belief, alleges that defendant, instead of selling said sugar at the higher prices that prevailed subsequent to April 1, 1941, retained most of it and sold it subsequent to August 31, 1941, at the high prices then prevailing. Defendant did not account to nor pay said plaintiff the price provided for in the contract for said sugar, but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets produced by plaintiff and other growers during the crop season of 1940 and delivered during said crop season under said standard form of contract but used the prices obtained for sugar sold from August 1, 1940 to August 31, 1941, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1940 and which was grown and delivered in previous crop seasons and which was sold by said defendant and the other manufacturers at the lower prices that prevailed from August 1, 1940 to December 31, 1940, instead of at the higher prices that prevailed when the 1940 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant, and the other manufacturers, well knowing that the price of sugar would rise prior to January 1, 1941, made various sales prior thereto after it and they had such knowledge to various purchasers so that

the purchasers would reap the profits resulting from the increased price which defendant and said other corporations knew was about to occur, at the expense, detriment and loss of said [84] plaintiff and other growers under like contracts.

XXIV.

Defendant has paid to said plaintiff the sum of \$102,767.13 for 25,430.3 tons of sugar beets of 15.55% average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1940 season. Said payment, however, was, as aforesaid, based not upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1940 crop season, but upon the sales made during the 1940 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and believes and, upon such information and belief, alleges that said sales were composed mainly of sugar manufactured previous to the 1940 season from beets not produced or delivered during the 1940 season.

XXV.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1940 season, but defendant has refused to and will not furnish and has not furnished any such accounting and plaintiff has no way or

means other than by an accounting suit to secure such information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from the beets delivered during the 1940 season, plaintiff would be entitled to receive under said contract at least \$30,000 more than plaintiff did receive.

XXVI.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the 1940 crop at the best price [85] obtainable but sacrificed portions of the same as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant and are not known to plaintiff.

XXVII.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1940, charged as expenses various improper amounts which should not

have been charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff. Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon such information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive [86] and there would have been due to plaintiff the additional sum of at least \$5,000.00.

XXVIII.

(a) In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid to plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$102,767.13 paid to plaintiff as aforesaid, was based upon 25,430.3 tons of beets of an average sugar content of 15.55%

and upon an alleged net return per 100 lbs. of sugar of \$3.160. In arriving at said sum of \$102,767.13, defendant erroneously and contrary to said agreement took an intermediate sugar price of \$4.04. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.160 was correct) would be \$4.04272 instead of \$4.04. As a result, defendant underpaid said plaintiff \$.00272 per ton, or a total of \$69.27, assuming that the net return per 100 lbs. of sugar was \$3.160.

(b) Furthermore defendant calculated the amount to be paid said plaintiff Mandeville Island Farms, Inc. for the 1940 crop upon the said schedule set forth in the standard contract and not upon the said schedules set forth in the said determination of the Secretary of Agriculture. Beets of a sugar content of 15.55% made into sugar which returned an average of \$3.160 per 100 lbs. to the manufacturer would pay the grower \$4.255 a ton, under the said determination schedules instead of \$4.04 a ton under the standard contract, schedule, a difference of 21 cents a ton or \$5,467.52 on 25,430.3 tons, which sum is due and unpaid to said plaintiff in addition to the other sums herein referred to.

As a Third Count, plaintiff, Roscoe C. Zuckerman, alleges:

XXIX.

Plaintiff refers to paragraphs I to XX of the First [87] Count and incorporates the same herein by reference as though set forth herein in full.

XXX.

On January 1, 1942, the price of sugar increased substantially in price, and during the month of April, 1942, the price of sugar again increased substantially in price and remained at said higher price for many months thereafter. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant, instead of selling said sugar on or before August 31, 1942, at the high prices that prevailed from April until August, 1942, sold but little of it and retained most of it and sold it subsequent to August 31, 1942, at the higher prices then prevailing. Defendant did not account to nor pay said plaintiff the price provided for in the contract for said sugar but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets produced by plaintiff and other growers during the crop season of 1941 and delivered during said crop season under said contract, but used the prices obtained for sugar sold from August 1, 1941 to August 31, 1942, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1941 and which was grown and delivered in previous crop seasons and which was sold at the lower prices that prevailed from August 1, 1941 to December 31, 1941, instead of at the higher prices that prevailed when the 1941 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant and the other sugar manufac-

turers, well knowing that the price of sugar would rise on January 1, 1942, made various sales prior thereto after it had such knowledge to various purchasers so that the purchasers would reap the profits resulting from the increased price which defendant knew was about to occur, at the expense, detriment and loss of said [88] plaintiff and other growers under like contracts.

XXXI.

Defendant has paid to said plaintiff the sum of \$74,794.76 for 14,144.7 tons of sugar beets of 15.47 average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1941 season. Said payment, however, was, as aforesaid, based not upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1941 crop season, but upon the sales made during the 1941 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and believes and, upon such information and belief, alleges that said sales were composed mainly of sugar manufactured previous to the 1941 season from beets not produced or delivered during the 1941 season.

XXXII.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1941 season, but defendant has refused to and will not furnish and has not furnished

any such accounting and plaintiff has no way or means other than by an accounting suit to secure such information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from beets delivered during the 1941 season, plaintiff would be entitled to receive under said contract at least \$30,000 more than plaintiff did receive.

XXXIII.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the 1941 crop at the best price obtainable [89] but sacrificed what it did sell, as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant and not known to said plaintiff.

XXXIV.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1941, charged as expenses various improper amounts which should not

have been charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff. Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon such information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive and there would have been due to plaintiff the additional sum of at [90] least \$5,000.00.

XXXV.

(a) In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid to plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$74,794.76 paid to plaintiff as aforesaid, was based upon 14,144.7 tons of beets of an average sugar content of 15.47% and upon an alleged net return per 100 lbs. of sugar of \$3.950. In arriving at said sum of \$74,794.76, de-

fendant erroneously and contrary to said agreement took an intermediate sugar price of \$5.29. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.950 was correct) would be \$5.32128 instead of \$5.29. As a result, defendant underpaid said plaintiff \$.03128 per ton, or a total of \$442.45, assuming that the net return per 100 lbs. of sugar was \$3.950.

(b) Furthermore, defendant calculated the amount to be paid said plaintiff Roscoe Zuckerman for the 1941 crop upon the said schedules set forth in the standard contract and not upon the said schedules set forth in the said determination of the Secretary of Agriculture. Beets of sugar content of 15.47% made into sugar which returned on an average \$3.950 per 100 lbs. to the manufacturer would pay the grower \$5.46048 a ton under the said determination schedule instead of \$5.29 as paid by defendant to plaintiff, a difference of \$.17048 a ton or \$2411.39 on 14,144.7 tons, which sum is due and unpaid to said plaintiff in addition to the other sums referred to herein.

Wherefore, plaintiffs pray judgment as by their amended complaint herein sought.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 23, 1948.

At a stated term, to-wit: The February Term. A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 12th day of July in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause No. 4643.]

MINUTE ORDER

On motion of Emmet H. Wilson, Jr., appearing for plaintiffs, Court orders Mandate of Supreme Court of U.S.A. as of June 21, 1948, filed and entered in minutes, to wit:

United States of America, ss:

The President of the United States of America,

[Seal]

MANDATE

To the Honorable the Judges of the District Court of the United States for the Southern District of California,

Greeting:

Whereas, lately in the United States Circuit Court of Appeals for the Ninth Circuit, in a cause between Mandeville Island Farms, Inc., and Roscoe C. Zuckerman, Appellants, and American Crystal Sugar Company, Appellee, wherein the judgment of the said Circuit Court of Appeals, entered in said

cause on the 14th day of January, A.D. 1947, is in the following words, viz:

“This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellants.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellee recover against the appellants, for costs herein expended, and have execution therefor.” [94]

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears. [95]

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and forty-seven, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that the said appellants, Mandeville Island

Farms, Inc., et al., recover from the said appellee One Hundred Twenty-three Dollars and Seventeen Cents for their costs herein expended and have execution therefor.

And it is further ordered, That this cause be, and the same is hereby, remanded to the District Court of the United States for the Southern District of California for further proceedings in conformity with the opinion of this Court.

May 10, 1948.

[96]

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding.

Witness, the Honorable Fred M. Vinson, Chief Justice of the United States, the sixteenth day of June, in the year of our Lord one thousand nine hundred and forty-eight.

Cost of appellants: Clerk, \$85.00; printing part of record, \$18.17; Attorney, \$20.00; Total, \$123.17.

/s/ CHARLES ELMORE CROPLEY,
Clerk of the Supreme Court of the United States.

[Endorsed]: Filed July 12, 1948 as of June 21, 1948. [97]

[Title of District Court and Cause No. 4643.]

ANSWER

Defendant for answer to the amended complaint herein, as amended, (hereinafter referred to as "said complaint") and to the several counts or claims therein set forth, admits, denies, and alleges as follows:

First Defense

1. Alleges that said complaint fails to state a claim upon which relief can be granted.

Second Defense

2. Alleges that the first count set forth in said complaint fails to state a claim upon which relief can be granted. [99]

Third Defense

3. Alleges that the second count set forth in said complaint fails to state a claim upon which relief can be granted.

Fourth Defense

4. Alleges that the third count set forth in said complaint fails to state a claim upon which relief can be granted.

Fifth Defense—Answer to First Count

5. Denies each and every allegation contained in said first count of said complaint, except the following:

(a) Admits diversity of citizenship as between

plaintiff and defendants and each of them and that said count is brought under the anti-trust laws against a defendant found within the Southern District of California and having an agent therein.

(b) Admits the allegations contained in Paragraphs II, III and IV of said count.

(c) Admits the allegations of Paragraph V commencing at line 14 of page 3 of said complaint and ending at line 26 of said page.

(d) Admits the allegations contained in subparagraph (a) of Paragraph VI.

(e) Admits that the principal market available to sugar beet growers in California north of the 36th parallel during the period 1938-1942 consisted of three sugar manufacturers, [100] of which defendant was one; and alleges that it is without knowledge or information sufficient to form a belief as to whether any of such growers could or could not have sold their beets at a profit to any other manufacturer.

(f) Admits the allegations contained in subparagraphs (c) and (d) of said Paragraph VI.

(g) Admits that this defendant had sugar beet seeds available during the said period for growers who contracted with it under form contracts of the type referred to in the next succeeding subparagraph (h) of this Paragraph 5; admits that it is its understanding that the other manufacturers referred to in Paragraph VI of said first count likewise had such seeds available; alleges that it is without knowledge or information sufficient to form a belief as to whether seeds were available from other sources.

(h) Admits the authenticity of the form and contents of those certain contracts, copies of which are annexed to said complaint and marked respectively Exhibits A, B, C and D; and admits and alleges that such contracts were each in use and were duly executed and duly performed according to their terms during and with relation to the particular crop year specified therein by this defendant and by any and all growers contracting with this defendant during such crop year, including plaintiff Mandeville Island Farms, Inc. for the crop years 1939 and 1940 and plaintiff Zuckerman for the crop year 1941.

(i) Admits the allegations contained in Paragraph X. [101]

(j) Admits that the then Secretary of Agriculture, after due investigation, notice and hearing to, among others, this defendant, did, on or about December 2, 1940, promulgate and cause to be thereafter duly published in the Federal Register the matter quoted in Paragraph XIV of said complaint commencing at page 11 thereof, line 23 and ending at page 12 thereof, line 19; and that the same was not subsequently appealed from, modified, abrogated or withdrawn.

(k) Admits the allegations contained in Paragraphs XV, XVI and XVII; and admits that plaintiffs have demanded and defendant has not furnished the information referred to in Paragraph XIII of said count.

(l) Admits and alleges that payments made to plaintiffs or either of them for the crop years 1939, 1940 and 1941 were made in manner and form as

provided in, respectively, Exhibits B, C and D annexed to said complaint.

(m) Alleges that the net sales return secured from sugar sold by defendant from its Clarksburg, California, factory, as compared with the average secured by all manufacturers of sugar north of the 36th parallel for the crop years 1939, 1940 and 1941, per 100 pounds, were as follows:

	Clarksburg	Average
1939	\$3.123	\$3.131
1940	3.163	3.160
1941	3.970	3.950

Defendant further alleges in this connection that it does not [102] know, and that it never has known, the individual net returns from sugar sales by the two manufacturers of beet sugar, other than itself, and having factories north of the 36th parallel.

(n) Admits that plaintiffs have employed the services of attorneys at law for the purpose of bringing this action.

Sixth Defense—Answer to Second Count (Mandeville)

6. Denies each and every allegation contained in said second count, except the following:

(a) It refers to subparagraphs (a) and (n) of Paragraph 5 hereof and incorporates the same and each of them herein by reference as though herein set forth in full.

(b) Admits that defendant paid to plaintiff Mandeville Island Farms, Inc. the sum of \$102,767.13

for 25,430.3 tons of sugar beets of 15.55% average sugar content delivered by said plaintiff to defendant and accepted by defendant from said plaintiff under said standard contract for the 1940 season. Further admits that said payment was based upon sales made during the 1947 season regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Further admits that said plaintiff made written demand upon defendant that it furnish said plaintiff with an accounting showing the average net returns from sugar manufactured from sugar beets produced and delivered during the 1941 season but defendant has not furnished such accounting. In this connection, defendant alleges that it has accounted fully and completely as to said season and as to all seasons herein involved in the manner and form as provided in [103] its said standard form contracts, copies of which are annexed to said complaint herein and marked, respectively, Exhibits B, C and D.

(c) Admits and alleges that the net return for sugar sold during the crop season of 1940 was determined by a certified public accountant, to-wit, Haskins & Sells, chosen by defendant and the other companies maintaining beet sugar factories located in California north of the 36th parallel by deducting from the gross sales price of such sugar all such charges and expenditures as are regularly and customarily deducted from gross sales price of sugar, in accordance with the respective companies' established systems of accounting, and showing net returns from sugar sold, after deducting also all ex-

cise, sales and other taxes, if any, imposed by act of law or state or Federal regulation. Said net return was determined, and said deductions were, as follows:

Gross sales, less cash discounts and allowances.....	\$4.455		
Less:			
Federal excise tax.....	\$.535		
Freight on sugar to destination.....	.468	1.003	
			\$3.452
Less sales and marketing expenses:			
Insurance on sugar only.....	\$.007		
State taxes, and personal property taxes on sugar	.031		
Storage on sugar (no charge is made for storage of sugar while in operative factory warehouses)	.071		
Loading, handling, reconditioning, and additional cost of packing in small packages.....	.071		
Brokerage and commissions.....	.051		
Miscellaneous, including sales department salaries and traveling expenses, advertising, telephone and telegraph expense, losses on accounts, etc. ....	.061	\$.292	
Net return from sales.....			\$3.160

(d) Admits that the sum of \$102,767.13 paid by defendant to plaintiff Mandeville Island Farms, Inc. for sugar beets purchased during the crop year 1940 was based upon 25,430.3 tons of beets of an average sugar content of 15.55% and upon an averaged net return per 100 pounds of sugar of \$3.160; and that in arriving at said sum of \$102,767.13 defendant took an intermediate value of beets of the above sugar content of \$4.04.

(e) Admits that defendant calculated the amount to be paid plaintiff Mandeville Island Farms, Inc. for the 1940 crop upon the schedule set forth in the

standard form contract (Exhibit C annexed to said complaint and not upon the schedule or schedules set forth in Paragraph XIV of said complaint.

Seventh Defense—Answer to Third
Count (Zuckerman)

7. Denies each and every allegation contained in said third count, except the following:

(a) It refers to subparagraphs (a) and (n) of Paragraph 5 hereof and incorporates the same and each of them herein [105] by reference as though herein set forth in full.

(b) Admits that defendant paid to plaintiff Zuckerman the sum of \$74,794.76 for 14,144.7 tons of sugar beets of 15.47% average sugar content delivered by said plaintiff to defendant and accepted by defendant from said plaintiff under said standard contract for the 1941 season. Further admits that said payment was based upon sales made during the 1941 season regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Further admits that said plaintiff made written demand upon defendant that it furnish said plaintiff with an accounting showing the average net returns from sugar manufactured from sugar beets produced and delivered during the 1941 season, but defendant has not furnished such accounting. In this connection, defendant alleges that it has accounted fully and completely as to said season and as to all seasons herein involved in the manner and form as provided in its said standard form contracts, copies of which are annexed to said com-

plaint herein and marked, respectively, Exhibits B, C and D.

(c) Admits and alleges that the net return for sugar sold during the crop season of 1941 was determined by a certified public accountant, to wit, Haskins & Sells, chosen by defendant and the other companies maintaining beet sugar factories located in California north of the 36th parallel by deducting from the gross sales price of such sugar all such charges and expenditures as are regularly and customarily deducted from gross sale price of sugar, in accordance with the respective companies' established systems of accounting, and showing net returns from sugar sold, after deducting also all excise, sales and other taxes, if any, [106] imposed by act of law or state or Federal regulation. Said net return was determined, and said deductions were, as follows:

Gross sales, less cash discounts and allowances.....	\$5.132		
Less:			
Federal excise tax.....	\$.535		
Freight on sugar to destination.....	.352	.887	\$4.245
		<hr/>	
Less sales and marketing expenses:			
Insurance on sugar only.....	\$.007		
State taxes, and personal property taxes on sugar	.040		
Storage on sugar (no charge is made for storage of sugar while in operative factory warehouses)	.056		
Loading, handling, reconditioning, and additional cost of packing in small packages.....	.077		
Brokerage and commissions.....	.042		
Miscellaneous, including sales department salaries and traveling expenses, advertising, telephone and telegraph expense, losses on accounts, etc.	.073	.295	
		<hr/>	
Net return from sales.....			\$3.950

(d) Admits that the sum of \$74,794.76 paid by defendant to plaintiff Zuckerman for sugar beets purchased from the latter during the crop year 1941 was based upon 14,144.7 tons of beets of an average sugar content of 15.47% and upon an averaged [107] net return per 100 pounds of sugar of \$3.950; and that in arriving at said sum of \$74,794.76 defendant took an intermediate value of beets of the above sugar content of \$5.29.

(e) Admits that defendant calculated the amount to be paid plaintiff Zuckerman for the 1941 crop upon the schedule set forth in the standard form contract (Exhibit D annexed to said complaint) and not upon the schedule or schedules set forth in Paragraph XIV of said complaint.

Eighth Defense—Mandeville, 1939

8. On or about August 31, 1940, an account in writing was stated by and between defendant and plaintiff Mandeville Island Farms, Inc. wherein and whereby defendant accounted in full to said plaintiff for any and all sugar beets sold and delivered by the latter to defendant during the crop year 1939 and paid to said defendant for said beets the sum of \$107,262.18, being the sum found and stated to be due in and by such accounting. Said sum was then and there accepted by said plaintiff in full satisfaction and payment and in final settlement of any and all amounts payable for said beets.

Ninth Defense—Mandeville, 1940

9. On or about August 31, 1941, an account in writing was stated by and between defendant and

plaintiff Mandeville Island Farms, Inc. wherein and whereby defendant accounted in full to said plaintiff for any and all sugar beets sold and delivered by the latter to defendant during the crop year 1940 and paid to said defendant for said beets the sum of \$102,767.13, being the sum found and stated to be due in and by such accounting. [108] Said sum was then and there accepted by said plaintiff in full satisfaction and payment and in final settlement of any and all amounts payable for said beets.

Tenth Defense—Zuckerman, 1941

10. On or about August 31, 1942, an account in writing was stated by and between defendant and plaintiff Zuckerman wherein and whereby defendant accounted in full to said plaintiff for any and all sugar beets sold and delivered by the latter to defendant during the crop year 1941 and paid to said defendant for said beets the sum of \$74,794.76, being the sum found and stated to be due in and by such accounting. Said sum was then and there accepted by said plaintiff in full satisfaction and payment and in final settlement of any and all amounts payable for said beets.

Eleventh Defense—Mandeville

11. Plaintiff Mandeville Island Farms, Inc. entered into, executed and performed each of those certain standard form contracts with defendant, specimen copies of which are annexed to said complaint and marked Exhibits B and C, respectively, of its own free will and volition and with full knowledge of each and all of the terms and contents of said contracts and each of them.

Twelfth Defense—Zuckerman

12. Plaintiff Zuckerman entered into, executed and performed that certain standard form contract with defendant, specimen copy of which is annexed to said complaint and marked Exhibit D, of his own free will and volition and with full knowledge of each [109] and all of the terms and contents of said contract.

Thirteen Defense

13. Any and all claims, demands or causes of action attempted to be set forth in said complaint, or in any count or counts thereof, and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than four years prior to the date of the commencement of this action are barred (a) by the provisions of subdivision 1 of Section 337 of the Code of Civil Procedure of California or (b) by the provisions of Section 343 of said Code.

Fourteenth Defense

14. Any and all claims, demands or causes of action attempted to be set forth in said complaint, or in any count or counts thereof, and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than three years prior to the date of the commencement of this action are barred (a) by the provisions of subdivision 1 of Section 338 of the Code of Civil Procedure of California or (b) by the provisions of subdivision 4 of said Section 338 of said Code.

Fifteenth Defense

15. Any and all claims, demands or causes of action attempted to be set forth in said complaint, or in any count or counts thereof, and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than two years prior to the date of the commencement of this action are barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of California. [110]

Sixteenth Defense

16. Any and all claims, demands or causes of action attempted to be set forth in said complaint, or in any count or counts thereof, and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than one year prior to the date of the commencement of this action are barred by the provisions of subdivision 1 of Section 340 of the Code of Civil Procedure of California.

Wherefore, this defendant prays that plaintiffs, and each of them, take nothing by their said complaint herein.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 12, 1948. [111]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO FIRST AMENDED COMPLAINT

Now comes plaintiffs, and leave of Court having first been obtained, amend their first amended complaint herein as follows:

I.

Amend paragraph XVIII to read as follows:

A. That portion of California north of the 36th parallel is, in this paragraph, referred to as "northern California." That portion of California south of the 36th parallel is herein referred to as "southern California."

B. The general method of paying for sugar beets in the United States was at all times herein involved a method commonly known and referred to by growers and manufacturers and by Government officials in the beet sugar industry as "the 50-50 method." Under this method the grower received 50% of the sales price of the sugar and sugar by-products manufactured by the manufacturer from the sugar beets and the manufacturer received the other 50%. The fair market price of beets during the cropping seasons herein involved in the United States was at least that price which would pay to the grower one half of the amount received by the manufacturer of the sugar from the beets of that grower for the sugar and sugar by-products produced from said beets by the manufacturer. In such a pricing, the grower was en-

titled to receive at least one half of the amount so received by the manufacturer, regardless of when the sugar produced from said beets was sold and regardless of whether the sugar produced from beets delivered in one crop year was sold in that crop year or at or during the next crop year, and if the sugar produced from beets in one crop year was sold in the next crop year at a higher price, then the grower was entitled to receive at least one-half of the said higher price.

C. Plaintiff is informed and believes and upon such information and belief alleges that the conspiracy above referred to was a part of a conspiracy to restrain interstate commerce in the sugar beets entered into by defendant and all other sugar beets manufacturers with plants in California and with other sugar beet manufacturers with plants in various parts of the United States outside of California whereby the manufacturers of sugar from sugar beets in various beet-producing areas of the United States (of which northern California was one and southern California was another) agreed between themselves that in each area the said manufacturers would fix the price to be paid the growers in each area and would pay such growers only a price determined by the average return of all manufacturers of sugar from sugar beets in each area; as a part of said general conspiracy, the above conspiracy as to northern California was entered into; as part of said general conspiracy, defendant and all manufacturers of sugar beets in southern California adopted and used during said cropping seasons a

method of paying growers based only on the average returns of all [114] manufacturers of sugar beets in said area; and as part of said general conspiracy defendant, in various other beet producing areas outside of California (unknown to plaintiff but particularly within defendant's knowledge) made payments to the growers therein during said periods, based solely on a price determined by the average return of sugar sales of all manufacturers in each of said areas.

D. Certain of the beets produced by plaintiffs, as aforesaid, and delivered to defendant, were by defendant shipped to defendant's sugar factory in southern California, located at Oxnard, where said beets were manufactured into sugar by defendant. The amount of beets so shipped is particularly within the knowledge of defendant. Said beets, when they reached the said southern California factory of defendant at Oxnard, were mingled with beets raised by various southern California growers and manufactured into sugar and it was, and at all times it has been, impossible to differentiate the sugar manufactured from plaintiffs' beets from that manufactured from beets grown in southern California.

E. During the crop years 1939, 1940 and 1941, there were four manufacturers that operated sugar beet refineries in southern California. Defendant is one of these four. Plaintiffs are informed and believe and upon such information and belief allege that said four manufacturers, including defendant, had, as a part of the general conspiracy above re-

ferred to, entered into a conspiracy in restraint of trade covering southern California, in the same manner as plaintiffs and the other manufacturers of sugar in northern California had entered into a conspiracy regarding sugar beets and the manufacture thereof into sugar in northern California. Plaintiffs are informed and believe and upon such information and belief allege that during said cropping years, said defendants and the other three manufacturers of sugar beets in southern California had, pursuant to said conspiracy, fixed and agreed upon [115] prices to be paid growers of sugar beets manufactured into sugar in their various southern California factories, which said price was the price determined upon the average net returns from the sale of the sugar of all the sugar manufacturers having factories in southern California, regardless of the return of any individual manufacturer.

F. Plaintiffs are informed and believe and upon such information and belief allege that in determining the average net price to be paid growers of sugar beets grown in northern California, the accountants who determined the same, pursuant to said growers' contracts, hereinabove referred to, did not include therein the returns from the sugar produced from beets grown in northern California and delivered to defendant by plaintiffs and other growers in the 1939, 1940 and 1941 cropping seasons but manufactured into sugar at the Oxnard plant of defendant. Plaintiffs are informed and believe and upon such information and belief allege that plaintiffs

and the other growers of sugar beets in California north of the 36th parallel, whose beets were delivered to defendant but were manufactured by defendant into sugar at its Oxnard plant, received no portion of the sales return from the sugar produced from said beets. Plaintiffs are informed and believe and upon such information and belief allege that in determining the average net returns paid growers of sugar beets raised in southern California during the cropping years 1939, 1940 and 1941, the accountants who determined the same included therein the returns from sugar produced by defendant in southern California from beets grown in northern California by plaintiff and other growers and delivered to defendant. Plaintiffs are informed and believe and upon such information and belief allege that the prices paid growers of sugar beets in southern California during said cropping years were determined by defendant and other manufacturers of sugar from sugar beets in [116] southern California by using the average net return secured by the southern California manufacturers of sugar from sugar beets, including defendant, from the sale of sugar produced at the southern California plants of said manufacturers, including defendant, from sugar beets refined at said southern California plants, regardless of where said sugar beets were produced, including sugar beets produced in northern California by plaintiff and other growers of sugar beets in northern California and shipped by defendant to its southern California plant.

G. Plaintiffs are informed and believe and upon such information and belief allege that the average net return from sugar manufactured in southern California during the cropping years 1939, 1940 and 1941 were greater than the average net return from sugar manufactured during the same cropping years in northern California; that as a result of the method of accounting used by defendant and the accountants who determined the average net return in northern California and the accountants who determined the average net return in southern California, defendant and its co-conspirators as a part of said conspiracy during said cropping years, kept for themselves and did not turn over to plaintiffs and the other growers any portion of the proceeds secured from the sugar beets of plaintiffs and other growers in northern California whose beets were manufactured into sugar in southern California.

H. Defendant paid plaintiffs certain sums for the 1939, 1940 and 1941 crops of sugar beets raised by plaintiffs but in carrying out said conspiracy and as a part and parcel thereof,

(a) defendant did not pay plaintiffs the reasonable value of the sugar beets delivered by plaintiffs to defendant;

(b) defendant did not pay plaintiffs upon the basis of the price secured from sugar manufactured from the beets delivered by plaintiffs and other growers located north of the 36th parallel to defendant; [117]

(c) defendant did not pay plaintiffs a price based upon the net return from sugar manufactured by defendant from the beets delivered to defendant by plaintiffs and other growers of sugar beets in northern California;

(d) defendant did not pay plaintiffs at least the minimum price determined by the Secretary of Agriculture as aforesaid;

(e) defendant paid plaintiffs by taking the average net return from sugar sold during the respective crop years by the defendant and the other two manufacturers who had sugar factories in northern California, and not including therein any return from sugar sold subsequent to said crop years from sugar manufactured during said crop years from beets produced during the said crop years and not including therein the return from sugar manufactured in southern California from sugar beets grown and delivered to defendant during said respective crop years in northern California;

(f) defendant did not pay plaintiffs or other growers in northern California for their beets shipped to Oxnard the prices paid other growers whose beets were also processed at Oxnard but were raised in southern California.

I. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, and if plaintiffs had received the reasonable value of their sugar beets in a market

unfettered and unhampered by said plan and conspiracy, plaintiffs are informed and believe and upon such information and belief allege that Mandeville Island Farms, Inc. would have received \$350,000.00 more and plaintiff Roscoe C. Zuckerman would have received at least \$100,000.00 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damages have been paid. The exact amount that plaintiffs were damaged, as aforesaid, can only be determined by an accounting whereby [118] defendant accounts to plaintiffs for one-half the net return secured from the sugar manufactured from the sugar beets produced by plaintiffs during said cropping years, regardless of where the beets were manufactured into sugar and regardless of whether the sugar produced from said sugar beets was sold during or subsequent to the crop year in which said sugar beets were grown, and whereby defendant accounts to plaintiff for not less than the price fixed by the Secretary of Agriculture as minimum and whereby defendants accounts to plaintiff for the price paid growers of sugar beets in northern California, southern California or the nearest market for sugar beets, free from any agreements in restraint of trade in which defendant is or was a party, whichever one was highest. Defendant has refused all requests and demands of plaintiffs for information on which plaintiffs could determine and could herein plead the specific amounts due to plaintiffs. Plaintiffs are entitled, by virtue of paragraph 15 of the Anti-Trust

Laws of the United States (15 U.S.C., Sec. 15) to have such damaged trebled.

II.

Amend paragraph IX by striking out the last sentence reading: "The reasonable price for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof" and substitute the following:

"The reasonable prices for sugar beets for the crop years here involved were, as plaintiffs are informed and believe, and therefore allege, \$350,000.00 more than Mandeville Island Farms, Inc. received and \$100,000.00 more than Roscoe C. Zuckerman received for said years."

III.

Amend paragraph 4 of the prayer by striking out the figures "\$315,043.80" and substituting for it "\$1,050,000.00" and amend paragraph 5 of the prayer by striking out the figures "\$112,192.14" and [119] substituting for it the figures "\$300,000.00."

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 24, 1949. [119]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO "AMENDMENT TO FIRST
AMENDED COMPLAINT"

Now come plaintiffs, and, leave of Court first having been obtained, amend the "Amendment to First Amended Complaint" filed herein February 24, 1949, to correct a typographical error, as follows:

1. Strike out the word "plaintiffs" in line 26, page 3, in that clause in subparagraph "E" of amended paragraph XVIII which now reads "in the same manner as plaintiffs and the other manufacturers of sugar in northern California had entered into a conspiracy regarding sugar beets and the manufacture thereof into sugar in northern California" and substitute therefor the word "defendant", so that that clause will read "in the same manner as defendant and the other manufacturers of sugar in northern California had entered into a conspiracy regarding sugar beets and the [122] manufacture thereof into sugar in northern California".

Dated: March 1, 1949.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed March 1, 1949. [123]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO ANSWER TO FIRST
AMENDED COMPLAINT, AS
AMENDED

Now Comes defendant American Crystal Sugar Company, a corporation, and after consent of plaintiffs, and each of them, first had and obtained, for amendment to its answer to the first amended complaint, as amended, alleges as follows:

Fifth Defense—Answer to First Count

5.

* * * * *

(g) Admits that this defendant had sugar beet seeds available during said period for growers who contracted with it under form contracts of the type referred to in the next succeeding subparagraph (h) of this Paragraph 5; admits that [125] it is its understanding that the other manufacturers referred to in Paragraph VI of said first count likewise had such seeds available; alleges that it is without knowledge or information sufficient to form a belief as to whether seeds were available from other sources, except to the extent that it is informed and believes and therefore alleges that Union Sugar Company, which said company has its principal office in San Francisco, California, sold seeds during the period from 1938 to 1942, or at least during some portions of said period, to sugar beet growers in California north of the 36th parallel.

* * * * *

(i) Admits the allegations contained in Paragraph X, except the following: Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth on page 9 of the amended complaint, commencing at line 8 with the phrase "while, at the same" and ending at line 19 of said page.

* * * * *

(l) Admits the allegations contained in subparagraph A of Paragraph XVIII.

(m) Admits the allegations contained in subparagraph D of Paragraph XVIII, except the following: Alleges that although it does know the tonnage, at the point of delivery, of the beets produced by plaintiffs, and each of them, and delivered to it which were subsequently shipped to its refinery in southern California located at Oxnard, it does not know the tonnage of plaintiffs' beets so shipped at the point of commencement of shipment to said refinery at said Oxnard.

(n) Answering the allegations of subparagraph E of Paragraph XVIII, alleges that during the crop years 1939, 1940, [126] and 1941 there were three manufacturers who operated sugar beet factories in southern California, to wit, Holly Sugar Corporation, Union Sugar Company, and defendant. Attached hereto, marked Exhibits 1 to 19, inclusive, respectively, and made a part hereof are copies of the contracts in force during said crop years between said manufacturers and the growers in said area.

(o) Admits the allegations contained in subpara-

graph F of Paragraph XVIII, except the following: Denies the allegations set forth on page 4 of the amendment to first amended complaint commencing at line 15 with the phrase "Plaintiffs are informed and" and ending at line 20 of said page.

(p) Answering the allegations of subparagraph G of Paragraph XVIII, admits and alleges that the average joint net return from sugar manufactured in southern California during the cropping years 1939, 1940 and 1941 was greater than the average joint net return from sugar manufactured during the same cropping years in northern California.

(q) Answering the allegations of subsections (b), (c) and (d) of subparagraph H of Paragraph XVIII, admits and alleges that payments made to plaintiffs, or either of them, for the crop years 1939, 1940 and 1941 were made in manner and form as provided in, respectively, Exhibits B, C and D annexed to the amended complaint. Admits the allegations contained in subsections (e) and (f) of subparagraph H of Paragraph XVIII.

Sixth Defense—Answer to Second Count
(Mandeville)

6.

* * * * *

(b) Admits that defendant paid to plaintiff Mandeville [127] Island Farms, Inc. the sum of \$102,-767.13 for 25,430.3 tons of sugar beets of 15.55% average sugar content delivered by said plaintiff to defendant and accepted by defendant from said plaintiff under said standard contract for the 1940 season. Further admits that said payment was based

upon sales made during the 1940 season regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Further admits that said plaintiff made written demand upon defendant that it furnish said plaintiff with an accounting showing the average net returns from sugar manufactured from sugar beets produced and delivered during the 1940 season but defendant has not furnished such accounting. In this connection, defendant alleges that it has accounted fully and completely as to said season and as to all seasons herein involved in the manner and form as provided in its said standard form contracts, copies of which are annexed to said complaint herein and marked, respectively, Exhibits B, C and D.

* * * * *

Seventh Defense—Answer to Third Count
(Zuckerman)

7.

(a) It refers to subparagraphs (a) through (q) of Paragraph 5 of its answer and of this amendment thereto and incorporates the same, and each of them, herein by reference as though herein set forth in full.

O'MELVENY & MYERS,
PIERCE WORKS, and
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed March 16, 1949. [128]

[Title of District Court and Cause No. 4643.]

NOTICE OF MOTION OF PLAINTIFFS TO
STRIKE PORTIONS OF PLAINTIFFS'
COMPLAINT AS AMENDED

To the Defendant and Its Attorney:

Take Notice that on Monday, January 9, 1940, at 2:00 p.m., in court room No. 6 of the U. S. Court House and Post Office Building, Los Angeles, California, plaintiffs will move the above entitled court for leave to strike from plaintiffs' amended complaint as amended, that portion of subpar. (b) of par. XIV found on page 12, lines 22 to 24 of "Amended Complaint", reading as follows:

"The fair and reasonable prices for sugar beets for the 1940 and 1941 California crops are as set forth in said determination."

Said motion will be based on the ground that by "Amendment to First Amended Complaint" filed February 24, 1949, similar words were stricken from par. IX and through an oversight they were not stricken from par. XIV and as a result the complaint as amended contains an inconsistency.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

Duly certified.

Acknowledgment of Service attached.

[Endorsed]: Filed December 27, 1949. [155]

In the District Court of the United States for the
Southern District of California, Central Division

No. 8353-WM

G. K. EVANS,

Plaintiff,

vs.

AMERICAN CRYSTAL SUGAR COMPANY,
a corporation,

Defendant,

COMPLAINT

Action For Accounting, Damages Under the
Anti-Trust Laws, Etc.

Now comes plaintiff above named and for cause
of action alleges:

I.

The grounds upon which the jurisdiction of the court depends are: (a) Diversity of citizenship; (b) this is an action brought by persons injured in their business and property by reason of acts of the defendant forbidden in the anti-trust laws of the United States (15 U.S.C. Sec. 15), and brought in a district in which the defendant is found and has an agent.

II.

(a) Plaintiff now is and at all times herein mentioned has been a citizen and inhabitant of the State of California and a resident of San Joaquin County in said State.

(b) Defendant American Crystal Sugar Company now is and [205] at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of New Jersey, with its principal office and place of business and executive departments in Denver, Colorado, and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California.

III.

(a) Camps 5, 6 and 7 of American Island, Contra Costa County, California, at times herein mentioned were areas of land suitable in composition, drainage, irrigation, location, climate and transportation facilities for the successful raising of sugar beets suitable for processing into sugar. At all times herein mentioned plaintiff had supplies, equipment, tools, personnel, labor, organization and knowledge adequate for the successful raising on said areas of sugar beets suitable for processing into raw sugar.

(b) A sugar crop season or year as referred to herein is from August 1st of any particular year to July 31st of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences.

IV.

The matter in controversy herein exceeds, exclusive of interest, costs, and attorney fees, the sum of \$3,000.00.

V.

On September 11, 1939, the second world war broke out and thereafter and up to December 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defenses against its possible entry into said conflict. On December 7, 1941 the Japanese attacked the United States at Pearl Harbor. This [206] was followed by declaration of war between the United States and all the members of the Axis. At all times from September 11, 1939, the sugar beet industry was and now is one of the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continues. The various steps involved in the production and protection of beet sugar, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar and the sale and distribution of sugar in interstate commerce to the ultimate consumer, were at all times herein mentioned and now are inextricably intermingled with and directly affected by each other and have an immediate relation on each other. Each

of said steps was at all times herein mentioned and now is a part of a transaction that commenced when the ground was prepared for planting the sugar beet seed and was completed when the sugar was used by the ultimate consumer.

VI.

(a) During the crop seasons 1938 to 1942, both inclusive, large acreages of agricultural land in the United States, including that portion of California north of the 36th parallel, Utah, Colorado, Michigan, Idaho, Illinois, Arizona and other states were planted to sugar beets. Said sugar beets, when harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were [207] bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured.

(b) The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the

three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and no grower of sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers.

(c) The sugar manufactured from said sugar beets was, during all of said period, sold in interstate commerce throughout the United States.

(d) After the raw sugar had been produced, it was impossible to distinguish the manufactured beet sugar manufactured from sugar beets grown in any one part of the United States from that manufactured from sugar beets grown in any other part of the United States.

(e) During said period above referred to, the only

sugar [208] beet seeds available in said portion of California were those securable from one of said three manufacturers and the only method of sale of marketable sugar beets used by growers of sugar beets in said area of California was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets.

VII.

In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturers. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacture of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar

beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net [209] return received from the sale of the manufactured raw sugar in interstate commerce.

VIII.

Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined under the contracts by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. But during the crop seasons of 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were de-

livered and by whom the beets were manufactured into raw sugar.

IX.

Thereupon and some time in 1937 or 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all in violation of the anti-trust laws of the United States, and as a part of said unlawful conspiracy agreed among themselves to do and did as follows during the crop years 1939, 1940, and 1941.

(a) Each no longer competed against any of the others as [210], to the price to be paid the growers for sugar beets raised in California north of the 36th parallel.

(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to-wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspirators north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

(c) Each no longer competed with any of the other

manufacturers of sugar north of the 36th parallel as to efficiency of sales or manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organization of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.

(d) Instead of paying the growers of sugar beets a reasonable price for their beets, each of said conspirators furnished seeds to, entered into contracts with and bought seeds only from growers who signed a standard printed form of contract prepared by said manufacturers, which contained the provision that the net return used as the basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California. Farmers contemplating or desirous of growing sugar beets either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a market to sell their marketable beets except for hog or cattle feed at a large loss. Attached hereto and marked Exhibits "B", "C" and "D", respectively, are the said standard printed form contracts [211] for the crop years 1939, 1940 and 1941.

(e) Said prices agreed upon by defendant and its co-conspirators to be paid by them and paid by them to plaintiff and other sugar beet growers in California north of the 36th parallel and set forth in

said Exhibits "B", "C" and "D" are not the reasonable prices for sugar beets. The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof.

(f) Each agreed not to enter into contracts with any grower who, prior to the crop year 1939, had dealt with any of the other refineries as to beets grown by said grower in land situated in California north of the 36th parallel and each agreed that each of them would retain the growers who had dealt with that company prior to the crop year 1939.

(g) Each would sell its sugar upon the multiple base point system of sales with San Francisco, California, New York City, N. Y., and New Orleans, Louisiana as the base points and with "phantom freight" included in and "freight absorption" taken from the delivered products.

X.

Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destina-

tion, and cash discounts to customers) secured by defendant were 3.641 cents per pound while, [212] at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .265 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel who had contracted with defendant received on the average from 291½ cents to 521½ cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of identical beets of identical sugar content delivered to the other manufacturers of beet sugar in California north of the 36th parallel.

XI.

During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer any such competition between the conspirators. Plaintiffs are informed and believe and upon such information and belief allege that defendant, as a result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed, and did not and refused to and did not

sign any contracts with or do business with any grower who, during the crop season of 1938, had dealt with one of the other conspirators. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said crop years than it would have had competition been free from and unrestrained by said conspiracy and plaintiffs did not receive the reasonable value of their sugar beets.

XII.

As a direct, expected and planned result of said conspiracy, [213] the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated, in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar

beet factories in California north of the 36th parallel but with three completely separate overheads and with none of the efficiency that consolidation into one corporation might bring.

XIII.

Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract and said conspiracy has been continued thereafter up to the present time in so far as defendant and each of its co-conspirators still refuse and will not make payments to any of the growers other than in accordance with the method agreed upon in said conspiracy as above set forth, and will not furnish any of the growers the individual, as contrasted with the pooled, sales return of the particular manufacturer with whom said grower dealt. Plaintiff herein demanded in writing such information of defendant but defendant refused to and has not furnished the same. [214]

XIV.

(a) Defendant and the other manufacturers of sugar referred to herein were at all times herein mentioned growers of sugar beets and "producers on the farm" of sugar beets and "processors of sugar beets" as those respective phrases are and were used in the Sugar Act of 1937. Plaintiff is informed and believes and upon such information alleges that each of said persons received payments for the crop years 1939, 1940, and 1941 from the Secretary of Agricul-

ture in accordance with Sec. 301 of the said Sugar Act. (7 U.S.C. 1131). Claude R. Wickard was at all times mentioned in this paragraph the duly appointed, qualified and acting Secretary of Agriculture. On December 2, 1940, said Secretary of Agriculture, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations duly made, did pursuant to Section 301d of said Sugar Act (7 U.S.C. 1131 (d)) make the following determination of the fair and reasonable price for the 1940 and 1941 crops of sugar: (5 Fed. Reg. 5231):

“Fair and reasonable prices for the 1940 and 1941 crops of sugar beets. The requirements of subsection (d) of section 301 of the Sugar Act of 1937, as amended, shall be deemed to have been fulfilled with respect to the 1940 and 1941 California crops of sugar beets if the producer-processor shall have paid rates for any sugar beets processed by him equal to those provided in the following schedule:

Percentum sucrose in beets		Average net return of sugar 100 lbs. of sugar			
.....	\$4.00	\$3.75	\$3.50	\$3.25	\$3.00
		Price per ton of sugar beets			
19.....	7.12	\$6.65	\$6.18	\$5.70	\$5.22
18	6.66	6.21	5.76	5.31	4.86
17	6.20	5.78	5.36	4.93	4.50
16	5.76	5.36	4.96	4.56	4.16
15	5.32	4.95	4.58	4.20	3.82
14	4.90	4.55	4.20	3.85	3.50

(Payments upon intermediate sugar prices and sugar content, or sugar prices or sugar content,

higher or lower than those shown in the foregoing schedule, shall be on the same proportionate basis.)

Provided, however, that in no event shall the average net return used as the settlement basis be determined by averaging the net proceeds realized from the sale of sugar by more than one producer-processor: And provided further, that a haulage allowance at a rate not less than $2\frac{1}{2}$ cents per mile per ton shall be granted to growers who perform such service in areas in which allowances have been agreed upon between producer-processors and growers.”

(b) No appeal has been taken from said determination and any time to appeal has expired; it has not been modified, abrogated, cancelled, or withdrawn, but has become final. The fair and reasonable prices for sugar beets for the 1940 and 1941 California crops are as set forth in said determination.

(c) The said determination of the Secretary of Agriculture under the Sugar Act of 1937 as to the fair and reasonable prices for the 1940 and 1941 California crops of sugar beets was made December 21, 1940, and was published in the said register on December 24, 1940, as aforesaid, but, nevertheless, defendant and its said co-conspirators, each of whom took part in the said hearings held by the Secretary of Agriculture, and each of whom well knew of the determination, persisted thereafter in their said conspiracy and would not buy beets from growers in California north of the 36th parallel except under

the terms and conditions set forth in said standard agreement.

XV.

Plaintiff and defendant on November 11, 1938, on December 11, 1939, and on December 23, 1940 entered into defendant's standard form contracts for the 1939, 1940 and 1941 crop season. Attached [216] hereto and marked Exhibits "B", "C" and "D" are copies of said respective contracts. Plaintiff performed each and every term, condition and covenant on his part to be performed in said contracts and delivered to defendant 4,517.1 tons of beets yielding 18.4% sugar under the 1939 contract, 3,698.1 tons of beets yielding 18.07% sugar under the 1940 contract and 4,401.7 tons of beets yielding 17.53% sugar under the 1941 contract, which beets were accepted by defendant and manufactured by it into sugar. Plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said manufacture is particularly within the knowledge of defendant.

XVI.

Said contracts Exhibits "B", "C" and "D" and the contracts theretofore entered into between sugar beet growers and refiners of sugar beets in California north of the 36th parallel, were drawn with the understanding that one-half of the net amount received for the sugar was to go to the grower and one-half to the refiner and the formulas set forth in said contracts and in the determination of reasonable prices by the Secretary of Agriculture hereinabove re-

ferred to, were prepared with the purpose and intent, as defendant well knew, of providing a mathematical formula that would so divide the net proceeds of the sugar.

XVII.

Defendant paid plaintiff for his 1939, 1940 and 1941 crops of sugar beets on August 31 of 1940, 1941 and 1942, respectively, but in carrying out said conspiracy and as a part and parcel thereof, said defendant paid plaintiff on said respective dates, not upon the price secured in interstate commerce from sugar manufactured from beets delivered by plaintiff and other growers located north of the 36th parallel to the refineries of defendant located north of the 36th parallel, as defendant had paid growers prior to the 1939 crop year and not upon the prices and the bases determined [217] by the Secretary of Agriculture to be fair and reasonable as aforesaid; but paid them in accordance with the average net return secured in interstate commerce for sugar by all manufacturers of beet sugar with refineries in California north of the 36th parallel and in accordance with the schedule set forth in the said standard contracts. Plaintiff is informed and believes and upon such information and belief alleges that the net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north of the 36th parallel. Plaintiff is informed and believes and upon such information and belief alleges that defendant retained and did not sell large quantities of the sugar manufactured in the cropping seasons 1939, 1940 and

1941 and from beets grown in California north of the 36th parallel by plaintiff and other growers and delivered to defendant, but retained the same beyond the respective crop years and sold the same subsequent to the close of the crop year 1941 at a higher gross and higher net price than the sugar sold during the respective crop years 1939, 1940 and 1941, but that defendant did not account to nor pay to plaintiff any part or portion of the higher prices so secured but retained and kept all of said higher prices, despite the fact that under the understanding and agreement between the parties and under the fundamental basis upon which the formulas were prepared, plaintiff was entitled to receive one-half of the said net interest. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff would have received at least \$50,000.00 more than he did receive under said contracts and said plaintiff sustained damages accordingly, no part of which has been paid. The exact amount that plaintiff was damaged, as aforesaid, can only be determined by an accounting in that defendant has refused all requests and demands of plaintiff for information on which plaintiff could [218] determine and could herein plead the specific amounts due to plaintiff. Plaintiff is entitled by virtue of paragraph 15 of the anti-trust laws of the United States (15 U.S.C. Sec. 15) to have such damages trebled.

XVIII

By reason of the foregoing acts of the defendant and its said conspirators, interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiff as aforesaid.

XIX.

Plaintiff, in order to enforce his rights against defendant, employed the services of attorneys at law and, under the anti-trust laws of the United States (15 U.S.C. Sec. 15), is entitled to reasonable attorneys' fees, the amount of which will depend upon the amount of work necessary to be performed herein by said attorneys.

XX.

From October 10, 1942, to June 30, 1946, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendment of 16 U.S.C. Sec. 16, passed October 10, 1942, as amended June 30, 1945 (Acts of Congress October 10, 1942, Ch. 589; 56 Stat. 781; 59 Stat. 306; U.S.C. 1940 ed., Sup. IV, p. 185; 15 U.S.C.A. 1947 Cum. An. P. P. Title 15, Sec. 16, p. 125), which was in full force and effect between October 10, 1942, and June 30, 1946.

Wherefore, plaintiff prays judgment against defendant as follows:

1. That defendant be required to account to plaintiff in connection with all sugar beets delivered by plaintiff to defendant [219] during the crop years 1939, 1940, and 1941, and for all sugar manufactured therefrom and sold by said defendant.

2. That plaintiff have judgment for the sum found to be due him by said accounting and that the amount so found due be trebled.

3. That plaintiff have judgment against defendant for \$75,000.00, with interest from August 31, 1941, together with attorney fees in such amount as the court may deem reasonable.

4. That plaintiff have judgment for his costs herein involved and attorney fees.

5. That plaintiff have judgment for such other and further relief as may be fit and proper in the premises.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiff.

Complaint amended: March 2, 1949.

[Endorsed]: Filed June 23, 1948. [220]

[Title of District Court and Cause No. 8353.]

NOTICE OF MOTIONS TO DISMISS AND TO
STRIKE FROM COMPLAINT

To Plaintiff in the Above Entitled Action and to
Messrs. Wood, Crump, Rogers, Arndt & Evans,
His Attorneys of Record:

Please Take Notice that defendant above named will, on Monday, September 20, 1948, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, move the above entitled Court, in Court Room No. 2 thereof, in the United States Post Office and Court House Building, Los Angeles, California, the Honorable William C. Mathes, Judge presiding, as follows:

1. To dismiss the action to the extent that it asserts [227] claims for damages arising out of alleged underpayments for sugar beets delivered by plaintiff to defendant under contracts between said parties for the crop years 1939 and 1940, upon the ground that the action, to said extent, accrued prior to October 3, 1941, and is therefore barred by the provisions of Section 338 (1) of the California Code of Civil Procedure.

2. To strike from the complaint the following parts or portions thereof:

(a) The following portion of Paragraph IX, appearing at page 8, lines 6 to 9:

“The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof.”

(b) The whole of Paragraph XIV, appearing at pages 11 to 12.

(c) The following portion of Paragraph XVI, appearing at page 13, lines 18 to 20:

“and in the determination of reasonable prices by the Secretary of Agriculture hereinabove referred to.”

(d) The following portion of Paragraph XVII, appearing at page 13, line 32 to page 14, line 2:

“and not upon the prices and the bases determined by the Secretary of Agriculture to be fair and reasonable as aforesaid;”

Said motion will be made upon the ground that the portions of the complaint moved to be stricken are immaterial.

3. To strike from the complaint the following parts or portions thereof: [228]

(a) The following portions of Paragraph XVI:

(1) Appearing at page 13, lines 13 to 18:

“Said contracts Exhibits ‘B’, ‘C’ and ‘D’ and the contracts theretofore entered into between the sugar beet growers and refiners of sugar beets in California north of the 36th parallel, were drawn with the understanding that one-half of the net amount received for the sugar was to go to the grower and one-half to the refiner and the formulas set forth in said contracts”

(2) Appearing at page 13, lines 20 to 22:

“were prepared with the purpose and intent,

as defendant well knew, of providing a mathematical formula that would so divide the net proceeds of the sugar."

Said motion will be made upon the grounds (a) that to permit proof of the above quoted portions of Paragraph XVI would be a violation of the parol evidence rule, and (b) that said allegations are immaterial.

4. To strike from the complaint the following part or portion thereof, appearing at page 14, lines 9 to 23:

"Plaintiff is informed and believes and upon such information and belief alleges that defendant retained and did not sell large quantities of the sugar manufactured in the cropping season 1939, 1940 and 1941 and from beets grown in California [229] north of the 36th parallel by plaintiff and other growers and delivered to defendant, but retained the same beyond the respective crop years and sold the same subsequent to the close of the crop year 1941 at a higher gross and higher net price than the sugar sold during the respective crop years 1939, 1940 and 1941, but that defendant did not account to nor pay to plaintiff any part or portion of the higher prices so secured but retained and kept all of said higher prices, despite the fact that under the understanding and agreement between the parties and under the fundamental bases upon which the formulas were prepared, plaintiff was entitled to receive one-half of the said net interest."

Said motion will be made upon the ground that the portion of the complaint moved to be stricken is immaterial.

Dated: August 18, 1948.

O'MELVENY & MYERS,
PIERCE WORKS, and
JOHN WHYTE,

/s/ By JOHN WHYTE,
Attorneys for Defendant. [230]

MEMORANDUM OF POINTS AND AUTHORITIES

I. Motion to Dismiss—Statute of Limitations

1. A motion to dismiss may be utilized to raise the bar of the statute of limitations whenever the complaint shows upon its face that the cause of action has not been brought within the statutory period,

Wright v. Bankers Service Corp. (S.D. Cal. 1941) 39 F. Supp. 980, 983-984;

Gossard v. Gossard (C.C.A. 10, 1945), 149 F. (2d) 111, 113;

Berry v. Chrysler Corp. (C.C.A. 6, 1945), 150 F. (2d) 1002, 1003;

Sinclair v. United States Gypsum Co. (W.D. N.Y. 1948), 75 F. Supp. 439, 442;

Statler v. Babcock (W.D. Pa. 1946), 9 Fed. Rules Serv. 86, 87-88;

Wilson v. Shores-Mueller Co. (N.D. Iowa 1941), 40 F. Supp. 729, 731;

even though the defendant seeks to dismiss the action only to the extent that it asserts claims for damages accruing prior to a certain date.

Abram v. San Joaquin Cotton Oil Co. (S.D. Cal. 1942), 46 F. Supp. 969, 971, 974-975.

Grosopian v. Pan American Refining Corp. (S.D. Texas 1947), 6 F.R.D. 453, 454-455.

2. In civil suits for treble damages under the federal anti-trust laws (15 U.S.C.A. Sec. 15), the applicable statute of limitations is that of the state in which the action is brought. [231]

Chattanooga Foundry and Pipe Works v. City of Atlanta (1906), 203 U.S. 390, 397.

Northern Kentucky Tel. Co. v. Southern Bell T. & T. Co. (C.C.A. 6, 1934), 73 F. (2d) 333, 334, cert. denied (1935) 294 U.S. 719.

Bluefields S. S. Co. v. United Fruit Co. (C.C.A. 3, 1917), 243 F. 1, 20, writ of error dismissed (1919) 248 U.S. 595.

Glenn Coal Co. v. Dickinson Fuel Co. (C.C.A. 4, 1934), 72 F. (2d) 885, 890.

3. The applicable statute of limitations in California appears to be the three year period of limitations prescribed by Section 338 (1) of the Code of Civil Procedure for "an action upon a liability created by statute, other than a penalty or forfeiture."

See *Foster & Kleiser Co. v. Special Site Sign Co.* (C.C.A. 9, 1936), 85 F. (2d) 742, 750-753, cert. denied (1937) 299 U.S. 613.

Cf. *Hansen Packing Co. v. Swift & Co.* (S.D.

N.Y. 1939), 27 F. Supp. 364 (action for treble damages under federal anti-trust laws is "a liability created by statute" and falls within the Montana statute of limitations requiring that "an action upon a liability created by statute, other than a penalty or forfeiture" be brought within two years).

Cf. *Momand v. Universal Film Exchange* (D.C. Mass. 1942), 43 F. Supp. 996 (action for treble damages under Section 4 of the Clayton Act governed [232] by Oklahoma statute prescribing a three year period of limitations for an action upon a "liability created by statute" other than a "penalty" or "forfeiture").

4. The complaint was filed on June 23, 1948. Therefore, assuming, without in any way conceding, that the Acts of Congress referred to in Paragraph XX thereof as suspending the statutes of limitations relating to violations of the anti-trust laws from October 10, 1942, to June 30, 1946, are applicable to private actions for treble damages thereunder, the three year period of limitations provided for in Section 338 (1) of the California Code of Civil Procedure would commence to run on October 3, 1941, and Plaintiff's cause of action would be barred to the extent that it accrued prior to that date.

5. In a civil action for damages allegedly sustained because of a conspiracy in restraint of trade, the right of recovery is not based upon the conspiracy but upon the injuries resulting therefrom; hence,

the cause of action arises when the damage occurs and the statute of limitations begins to run at that time.

Foster & Kleiser Co. v. Special Site Sign Co.
(supra) at pages 750-751.

Bluefields S. S. Co. v. United Fruit Co. (supra)
at page 20.

Momand v. Paramount Pictures Distributing
Co. (D.C. Mass. 1941), 36 F. Supp. 568, 570.

6. The gist of the action set forth in the complaint [233] is to recover damages arising out of alleged underpayments for sugar beets delivered by plaintiff grower to defendant processor during the crop years 1939, 1940 and 1941 under the defendant's standard form contracts separately covering each of said crop years. (Complaint, Pars. XV and XVII.) A crop year commences on August 1st of any particular year and continues until July 31st of the succeeding calendar year. (Complaint, Par. III.) Thus, the crop year 1939, for example, began on August 1, 1939, and ended on July 31, 1940.

Copies of the above mentioned contracts for the crop years 1939, 1940 and 1941 are attached to the complaint as Exhibits "B", "C" and "D", respectively. Each of them provides in Paragraph 5 thereof for partial monthly settlements for beets delivered by the grower during the preceding month and for final settlement for all beets delivered under the contract not later than August 31st of the following calendar year. Consequently, under the terms of said contracts, plaintiff was unable to ascertain with certainty whether or not he had been damaged,

i.e., under paid, for one or more of the crop years 1939, 1940 or 1941, until the final settlement for beets delivered during each of said years had been made on August 31, 1940, August 31, 1941, and August 31, 1942, respectively. For this reason, in so far as plaintiff is asserting any claims for damages resulting from an alleged underpayment for beets delivered by him to defendant under the 1939 and 1940 crop year contracts, to this extent his cause of action accrued partly on August 31, 1940, and partly on August 31, 1941, or prior to the cut-off date of October 3, 1941, and is therefore barred by the statute of limitations. [234]

7. In this connection see particularly

Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co. (W.D. Ky. 1941), 37 F. Supp. 728:

“This action is not based upon the making of the contracts. It is based upon commissions paid to Fitch upon coal purchased by the plaintiff from the Coal Company. The payment of the commission is the gist of the action. The pre-existing contracts may be the basis for the purchase by the plaintiff of coal from the Coal Company as it becomes necessary for such coal to be purchased, but it is the actual purchase of the coal at a definite price and the payment of the commission to the buyer’s agent upon that purchase that creates the liability.” (at p. 736)

* * * * *

“Defendants also contend that the action should be dismissed because it is barred by the

five-year statute of limitations as set out in Section 2515 of Carroll's Kentucky Statutes. This proceeds upon the theory that the cause of action arises out of the alleged inducing and procurement of the execution of the coal purchase contract in March, 1933, which is more than five years before this action was filed. This again fails to recognize the essential nature of the present suit. As stated in the preceding paragraph the cause of action arises out of the payment of commissions subsequent to June 19, 1936, [235] the effective date of the Robinson-Patman Act. Such payments of commissions were not illegal before that time and no cause of action for treble damages by reason thereof existed under the Clayton Act until that date." (at p. 738.)

II. Motion to Strike

A. Determinations of the Secretary of Agriculture.

8. The determination of a reasonable price for sugar beets by the Secretary of Agriculture is merely a condition precedent to his making payments under the Sugar Act.

Plaintiff lays stress upon the determination by the Secretary of Agriculture of a fair and reasonable price for sugar beets under the Sugar Act as being controlling and absolute. Recourse to the Act, however, (7 U.S.C.A. Sec. 1100, et seq., particularly Sec. 1131 and subsec. (c) (2) thereof), reveals that such determination by the Secretary is merely a condition

precedent to the payment by him of benefits to certain producers and processors of sugar beets. Other conditions, for instance, are no child labor, proportionate share production and proper wage standards. Such being the case, we have moved to strike all allegations regarding the Secretary's determination as immaterial, both for the above reason and for the further reason that here we are dealing with duly executed contracts providing their own contract price.

Indeed, if we follow plaintiff's thesis to its logical conclusion, he himself has supplied a further ground of immateriality in this regard. The complaint alleges in Paragraph XIV thereof, on information and belief, that this defendant received payments under the Act. If we assume this statement to be true, [236] plaintiff is met with the provisions of Sec. 306 of the Act (7 U.S.C.A. Sec. 1136), which provide that the facts constituting the basis of any payment made (among which bases are, of course, the determination that the prices paid by the processors were reasonable) shall be reviewable only by the Secretary, and his determinations with respect thereto shall be final and conclusive.

It follows that, on plaintiff's own theory of the case, he may not attack the reasonableness of defendant's prices paid for beets during the years 1939, 1940 and 1941 unless and until he has exhausted such administrative remedies before the Secretary as are reserved to him by the Act.

B. Understanding with which contracts were drawn.

9. To permit proof of the allegations of Paragraph XVI that the contracts between the parties for the crop years 1939, 1940 and 1941 "were drawn with the understanding that one-half of the net amount received for the sugar was to go to the grower and one-half to the refiner" and that "the formulas set forth in said contracts * * * were prepared with the purpose and intent * * * of providing a mathematical formula that would so divide the sugar," when the contracts themselves contain nothing to this effect, would be a flagrant violation of the parol evidence rule.

The execution of a written contract supersedes all the negotiations or stipulations concerning its matters which preceded or accompanied its execution when there is no ambiguity therein and no fraud or mistake is alleged or proved.

California Civil Code, Section 1625.

California Code of Civil Procedure, Section 1856. [237]

Alameda County Title Ins. Co. v. Panella (1933), 218 Cal. 510, 513-514.

San Francisco Milling Co. v. Frye & Co. (1934), 2 Cal. App. (2d) 563, 566.

Thomson v. Langton (1920, 45 Cal. App. 415, 416.

Thoroman v. David (1926), 199 Cal. 386, 389-390.

United Iron Works v. Outer Harbor Dock, etc., Co. (1914), 168 Cal. 81, 84-85.

In any event the fact that the schedules of payment for beets set forth in the contracts were pre-

pared with the intention of dividing the net return received for the sugar equally between the grower and the processor is wholly immaterial.

C. Interpretation of contracts.

10. The question presented by the motion to strike that portion of Paragraph XVII of the complaint appearing at page 14, lines 9 to 23 depends upon a construction of the form contracts between the parties for the crop years 1939, 1940 and 1941, which are attached to the complaint as Exhibits "B", "C" and "D", respectively. The question is this: Was defendant obligated to pay plaintiff for beets purchased by it from plaintiff during a particular crop year upon the basis of the sales of sugar manufactured from those particular beets, or upon the basis of sugar sold during such crop year irrespective of when the beets going to make up such sugar were raised?

11. Defendant was obligated under the contracts involved [238] to pay plaintiff upon the basis of sugar sold during a particular crop year irrespective of when the beets going to make up the same were raised.

In this regard the contracts provide that the price per ton for beets delivered "hereunder" shall be determined upon the average net returns received "for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1" of the crop year involved, and based upon the sugar content, etc. In view of this language,

plaintiff's position that he should be paid on the basis of returns from the sugar manufactured from the beets delivered during the crop years 1939, 1940 and 1941, which said sugar he alleges, on information and belief, was sold after the close of the crop year 1941 at a higher net price than the sugar sold during said three crop years, is clearly untenable. The terms of the contract are plain—the test is average net returns from (a) sugar manufactured at beet sugar factories located in California north of the 36th parallel, (b) and sold during the twelve months' period specified. It is submitted that to hold otherwise would be to rewrite the contract of the parties.

It is therefore respectfully urged that for the reasons hereinabove set forth, the motions presented herewith should be granted.

Respectfully submitted,

O'MELVENY & MYERS,
PIERCE WORKS and
JOHN WHYTE,

/s/ By JOHN WHYTE,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed August 18, 1948. [239]

[Title of District Court and Cause—No. 8353.]

AMENDMENT TO COMPLAINT

Now comes plaintiff, and, pursuant to Rule 15-A of the Rules of Civil Procedure, amends his complaint on file herein as a matter of correction, by

adding thereto a new paragraph to be numbered XXI, as follows:

XXI.

During the period that plaintiff farmed the land described in the contracts Exhibits B, C and D, defendant was the owner of said land and the plaintiff was a share tenant or share cropper of defendant, farming said land, and during all of said period, as defendant well knew, plaintiff trusted and relied upon and had implicit confidence in defendant. Defendant owed a duty to plaintiff at all times during said period to disclose to plaintiff the existence of the conspiracy hereinabove set forth but defendant did not do so but concealed the existence of said conspiracy from plaintiff and did not reveal same to plaintiff. Plaintiff knew nothing of said conspiracy [241] until he read a news story in a Stockton, California newspaper on May 10, 1948, reporting, as a news item, the decision of the Supreme Court of the United States in *Mandeville Island Farms, Inc. and R. C. Zuckerman* against defendant herein. The action of said Supreme Court was in a case that arose in this court and which is numbered herein 4643 B.H. Following the reading of said news story, plaintiff caused an investigation to be made and as a result of this investigation this action resulted. At no time prior to May 10, 1948 did it know or suspect said conspiracy and at no time prior to May 10, 1948 did he have any knowledge thereof or did he have any knowledge that he was not paid the amount he would have received had there been no conspiracy. The filing of the action herein was the first demand by

plaintiff for payment of the amount to which he would have been entitled to receive were it not for said conspiracy.

Wherefore, plaintiff prays relief as by complaint sought.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 8, 1948. [242]

[Title of District Court and Cause No. 8353.]

MEMORANDUM

Motion to dismiss the action to the extent that it asserts claims for damages arising out of alleged underpayments for sugar beets delivered by plaintiff to defendant under contracts between said parties for the crop years 1939 and 1940, upon the ground that the action, to said extent, accrued prior to October 3, 1941, is granted.

Motion to strike is denied.

Defendant is granted twenty days to answer.

Dated: This 22nd day of November, 1948.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed Nov. 22, 1948. [244]

[Title of District Court and Cause No. 8353.]

ANSWER

Defendant for answer to the complaint herein and to the claim or claims therein set forth and not heretofore dismissed by the above entitled Court, admits, denies and alleges as follows:

First Defense

1. Alleges that said complaint fails to state a claim upon which relief can be granted.

Second Defense

2. Denies each and every allegation contained in said complaint, except the following: [245]

(a) Admits diversity of citizenship as between plaintiff and defendants and each of them and that said action is brought under the antitrust laws against a defendant found within the Southern District of California and having an agent therein.

(b) Admits the allegations contained in Paragraphs II, III and IV of said complaint.

(c) Admits the allegations of Paragraph V commencing at line 28 of page 2 of said complaint and ending at line 6 of page 3 thereof. Admits that the United States Government rationed the use of sugar in the United States.

(d) Admits the allegations contained in subparagraph (a) of Paragraph VI.

(e) Admits that the principal market available to sugar beet growers in California north of the 36th parallel during the period 1938-1942 consisted of three sugar manufacturers, of which de-

fendant was one; and alleges that it is without knowledge or information sufficient to form a belief as to whether any of such growers could or could not have sold their beets at a profit to any other manufacturer.

(f) Admits the allegations contained in subparagraphs (c) and (d) of said Paragraph VI.

(g) Admits that this defendant had sugar beet seeds available during said period for growers who contracted with it under form contracts of the type referred to in the next succeeding [246] subparagraph (h) of this Paragraph 5; admits that it is its understanding that the other manufacturers referred to in Paragraph VI of said first count likewise had such seeds available; alleges that it is without knowledge or information sufficient to form a belief as to whether seeds were available from other sources.

(h) Admits the authenticity of the form and contents of that certain contract, a copy of which is annexed to said complaint and marked Exhibit D; and admits and alleges that said contract was in use and was duly executed and duly performed according to its terms during and with relation to the particular crop year, to wit, 1941, specified therein by this defendant and by any and all growers contracting with this defendant during such crop year, including plaintiff herein.

(i) Admits the allegations contained in Paragraph X.

(j) Admits that the then Secretary of Agriculture, after due investigation, notice and hearing to,

among others, this defendant, did, on or about December 2, 1940, promulgate and cause to be thereafter duly published in the Federal Register the matter quoted in Paragraph XIV of said complaint commencing at page 11 thereof, line 19 and ending at page 12 thereof, line 13; and that the same was not subsequently appealed from, modified, abrogated or withdrawn.

(k) Admits the allegations contained in Paragraph XV.

(l) Admits and alleges that payments made to plaintiff [247] for the crop year 1941 were made in manner and form as provided in Exhibit D annexed to said complaint.

(m) Alleges that the net sales return secured from sugar sold by defendant from its Clarksburg, California, factory, as compared with the average secured by all manufacturers of sugar north of the 36th parallel for the crop year 1941, per 100 pounds, was as follows:

	Clarksburg	Average
1941	\$3.970	\$3.950

Defendant further alleges in this connection that it does not know, and that it never has known, the individual net returns from sugar sales by the two manufacturers of beet sugar, other than itself, and having factories north of the 36th parallel.

(n) Admits that plaintiff has employed the services of attorneys at law for the purpose of bringing this action.

Third Defense

3. On or about August 31, 1942, an account in writing was stated by and between defendant and plaintiff wherein and whereby defendant accounted in full to said plaintiff for any and all sugar beets sold and delivered by the latter to defendant during the crop year 1941 and paid to said defendant for said beets the sum of \$27,080.00, being the sum found and stated to be due in and by such accounting. Said sum was then and there accepted by said plaintiff in full satisfaction and payment and in final settlement of any and all amounts payable for said beets.

Fourth Defense

4. Plaintiff entered into, executed and performed that certain standard form contract with defendant, a copy of which is annexed to said complaint and marked Exhibit D, of its own free will and volition and with full knowledge of each and all of the terms and contents of said contract.

Fifth Defense

5. Any and all claims, demands or causes of action attempted to be set forth in said complaint and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than four years prior to the date of the commencement of this action, are barred (a) by the provisions of subdivision 1 of Section 337 of the Code of Civil Procedure of California or (b) by the provisions of Section 343 of said code.

Sixth Defense

6. Any and all claims, demands or causes of ac-

tion attempted to be set forth in said complaint and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than three years prior to the date of the commencement of this action, are barred (a) by the provisions of subdivision 1 of Section 338 of the Code of Civil Procedure of California or (b) by the provisions of subdivision 4 of said Section 338 of said code.

Seventh Defense

7. Any and all claims, demands or causes of action attempted to be set forth in said complaint and as well any [249] and all parts or portions of any of said claims, demands or causes of action, which accrued more than two years prior to the date of the commencement of this action, are barred by the provisions of subdivision 1 of Section 339 of the Code of Civil Procedure of California.

Eighth Defense

8. Any and all claims, demands or causes of action attempted to be set forth in said complaint and as well any and all parts or portions of any of said claims, demands or causes of action, which accrued more than one year prior to the date of the commencement of this action, are barred by the provisions of subdivision 1 of Section 340 of the Code of Civil Procedure of California.

Wherefore, this defendant prays that plaintiff take nothing by his said complaint herein; that this Court determine, either in the event of recovery by plaintiff or otherwise, whether this defendant is entitled to any credits, offsets or payments under and

by virtue of the above mentioned contract, Exhibit D; and, if so, that judgment be entered in accordance with said determination.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed December 10, 1948. [250]

[Title of District Court and Cause—No. 8353.]

AMENDMENT TO COMPLAINT

Now comes plaintiff and leave of court having been obtained, amends his complaint herein as follows:

I.

Amends paragraph XVII to read as follows:

(A) That portion of California north of the 36th parallel is, in this paragraph, referred to as "northern California". That portion of California south of the 36th parallel is herein referred to as "southern California."

(B) The general method of paying for sugar beets in the United States was at all times herein involved a method commonly known and referred to by growers and manufacturers and by Government officials in the beet sugar industry as "the 50-

50 method." Under this method the grower received 50% of the sales price of the sugar and sugar by-products manufactured by the manufacturer from the sugar [252] beets and the manufacturer received the other 50%. The fair market price of beets during the cropping seasons herein involved in the United States was at least that price which would pay to the grower one-half of the amount received by the manufacturer of the sugar from the beets of that grower for the sugar and sugar by-products produced from said beets by the manufacturer. In such a pricing, the grower was entitled to receive at least one-half of the amount so received by the manufacturer, regardless of when the sugar produced from said beets was sold and regardless of whether the sugar produced from beets delivered in one crop year was sold in that crop year or at or during the next crop year, and if the sugar produced from beets in one crop year was sold in the next crop year at a higher price, then the grower was entitled to receive at least one-half of the said higher price.

(C) Plaintiff is informed and believes and upon such information and belief alleges that the conspiracy above referred to was a part of a conspiracy to restrain interstate commerce in the sugar beets entered into by defendant and all other sugar beets manufacturers with plants in California and with other sugar beet manufacturers with plants in various parts of the United States outside of California whereby the manufacturers of sugar from sugar beets in various beet-producing areas of the United States (of which northern California was one and

southern California was another) agreed between themselves that in each area the said manufacturers would fix the price to be paid the growers in each area and would pay such growers only a price determined by the average return of all manufacturers of sugar from sugar beets in each area; as a part of said general conspiracy, the above conspiracy as to northern California was entered into; as part of said general conspiracy, defendant and all manufacturers of sugar beets in southern California adopted and used during said cropping seasons a method of paying growers based only on the average returns of all manufacturers of sugar beets in said area; and as part of said [253] general conspiracy defendant, in various other beet producing areas outside of California (unknown to plaintiff but particularly within defendant's knowledge) made payments to the growers therein during said periods, based solely on a price determined by the average return of sugar sales of all manufacturers in each of said areas.

(D) Certain of the beets produced by plaintiff, as aforesaid, and delivered to defendant, were by defendant shipped to defendant's sugar factory in southern California, located at Oxnard, where said beets were manufactured into sugar by defendant. The amount of beets so shipped is particularly within the knowledge of defendant. Said beets, when they reached the said southern California factory of defendant at Oxnard, were mingled with beets raised by various southern California growers and manufactured into sugar and it was, and at all times it has been, impossible to differentiate the sugar manu-

factured from plaintiff's beets from that manufactured from beets grown in southern California.

(E) During the crop years 1939, 1940 and 1941, there were four manufacturers that operated sugar beet refineries in southern California. Defendant is one of these four. Plaintiff is informed and believes and upon such information and belief alleges that said four manufacturers, including defendant, had, as a part of the general conspiracy above referred to, entered into a conspiracy in restraint of trade covering southern California, in the same manner as defendant and the other manufacturers of sugar in northern California had entered into a conspiracy regarding sugar beets and the manufacture thereof into sugar in northern California. Plaintiff is informed and believes and upon such information and belief alleges that during said cropping years, said defendants and the other three manufacturers of sugar beets in southern California had, pursuant to said conspiracy, fixed and agreed upon prices to be paid growers of sugar beets manufactured into sugar [254] in their various southern California factories, which said price was the price determined upon the average net returns from the sale of the sugar of all the sugar manufacturers having factories in southern California, regardless of the return of any individual manufacturer.

(F) Plaintiff is informed and believes and upon such information and belief alleges that in determining the average net price to be paid growers of sugar beets grown in northern California, the accountants who determined the same, pursuant to said growers'

contracts, hereinabove referred to, did not include therein the returns from the sugar produced from beets grown in northern California and delivered to defendant by plaintiff and other growers in the 1939, 1940 and 1941 cropping seasons but manufactured into sugar at the Oxnard plant of defendant. Plaintiff is informed and believes and upon such information and belief alleges that plaintiff and the other growers of sugar beets in California north of the 36th parallel, whose beets were delivered to defendant but were manufactured by defendant into sugar at its Oxnard plant, received no portion of the sales return from the sugar produced from said beets. Plaintiff is informed and believes and upon such information and belief alleges that in determining the average net returns paid growers of sugar beets raised in southern California during the cropping years 1939, 1940 and 1941, the accountants who determined the same included therein the returns from sugar produced by defendant in southern California from beets grown in northern California by plaintiff and other growers and delivered to defendant. Plaintiff is informed and believes and upon such information and belief alleges that the prices paid growers of sugar beets in southern California during said cropping years were determined by defendant and other manufacturers of sugar from sugar beets in southern California by using the average net return secured by the southern California manufacturers of sugar from sugar beets, including [255] defendant, from the sale of sugar produced at the southern California plants of said manufacturers,

including defendant, from sugar beets refined at said southern California plants, regardless of where said sugar beets were produced, including sugar beets produced in northern California by plaintiff and other growers of sugar beets in northern California and shipped by defendant to its southern California plant.

(G) Plaintiff is informed and believes and upon such information and belief alleges that the average net return from sugar manufactured in southern California during the cropping years 1939, 1940 and 1941 were greater than the average net return from sugar manufactured during the same cropping years in northern California; that as a result of the method of accounting used by defendant and the accountants who determined the average net return in northern California and the accountants who determined the average net return in southern California defendant and its co-conspirators as a part of said conspiracy during said cropping years, kept for themselves and did not turn over to plaintiff and the other growers any portion of the proceeds secured from the sugar beets of plaintiff and other growers in northern California whose beets were manufactured into sugar in southern California.

(H) Defendant paid plaintiff certain sums for the 1939, 1940 and 1941 crops of sugar beets raised by plaintiff but in carrying out said conspiracy and as a part and parcel thereof,

(a) defendant did not pay plaintiff the reasonable value of the sugar beets delivered by plaintiff to defendant;

(b) defendant did not pay plaintiff upon the basis of the price secured from sugar manufactured from the beets delivered by plaintiff and other growers located north of the 36th parallel to defendant;

(c) defendant did not pay plaintiff a price based upon [256] the net return from sugar manufactured by defendant from the beets delivered to defendant by plaintiff and other growers of sugar beets in northern California;

(d) defendant did not pay plaintiff at least the minimum price determined by the Secretary of Agriculture as aforesaid;

(e) defendant paid plaintiff by taking the average net return from sugar sold during the respective crop years by the defendant and the other two manufacturers who had sugar factories in northern California, and not including therein any return from sugar sold subsequent to said crop years from sugar manufactured during said crop years from beets produced during said crop years and not including therein the return from sugar manufactured in southern California from sugar beets grown and delivered to defendant during said respective crop years in northern California;

(f) defendant did not pay plaintiff or other growers in northern California for their beets shipped to Oxnard the prices paid other growers whose beets were also processed at Oxnard but were raised in southern California.

(I) Had it not been for said unlawful plan and

conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, and if plaintiff had received the reasonable value of his sugar beets in a market unfettered and unhampered by said plan and conspiracy, plaintiff is informed and believes and upon such information and belief alleges that plaintiff would have received \$50,000.00 more than he did receive under said contract, and plaintiff sustained damage accordingly, none of which damage has been paid. The exact amount that plaintiff was damaged, as aforesaid, can only be determined by an accounting whereby defendant accounts to plaintiff for one-half the net return secured from the sugar manufactured from the sugar beets produced by plaintiff during said cropping years, regardless of where the beets [257] were manufactured into sugar and regardless of whether the sugar produced from said sugar beets was sold during or subsequent to the crop year in which said sugar beets were grown, and whereby defendant accounts to plaintiff for not less than the price fixed by the Secretary of Agriculture as minimum and whereby defendant accounts to plaintiff for the price paid growers of sugar beets in northern California, southern California or the nearest market for sugar beets, free from any agreements in restraint of trade in which defendant is or was a party, whichever one was highest. Defendant has refused all requests and demands of plaintiff for information on which plaintiff could determine and could herein plead the specific amounts due to plain-

tiff. Plaintiff is entitled, by virtue of paragraph 15 of the Anti-Trust laws of the United States (15 U.S.C., Sec. 15) to have such damages trebled.

II.

Amends sub-paragraph (e) of Paragraph IX of said complaint by striking out the last sentence reading "The reasonable price for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in Paragraph XIV hereof" and by substituting the following: "The reasonable price for sugar beets for the crop years here involved was as plaintiff is informed and believes and therefore alleges \$50,000 more than plaintiff received for said years".

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT.

Acknowledgment of Service attached.

[Endorsed]: Filed March 2, 1949. [258]

[Title of District Court and Cause—No. 8353.]

AMENDMENT TO ANSWER TO COMPLAINT
AS AMENDED

Now comes defendant American Crystal Sugar Company, a corporation, and after consent of plaintiff first had and obtained, for amendment to its answer to the complaint, as amended, alleges as follows:

Second Defense

2.

* * *

(g) Admits that this defendant had sugar beet seeds available during said period for growers who contracted with it under form contracts of the type referred to in the next succeeding subparagraph (h) of this Paragraph 2; admits that [260] it is its understanding that the other manufacturers referred to in Paragraph VI of said complaint likewise had such seeds available; alleges that it is without knowledge or information sufficient to form a belief as to whether seeds were available from other sources, except to the extent that it is informed and believes and therefore alleges that Union Sugar Company, which said company has its principal office in San Francisco, California, sold seeds during the period from 1938 to 1942, or at least during some portions of said period, to sugar beet growers in California north of the 36th parallel.

* * *

(i) Admits the allegations contained in Paragraph X, except the following: Alleges that it is

without knowledge or information sufficient to form a belief as to the truth of the allegations set forth on page 8 of the complaint, commencing at line 32, with the word "while," and ending on page 9 at line 11 of said complaint.

* * *

(l) Admits the allegations contained in subparagraph A of Paragraph XVII.

(m) Admits the allegations contained in subparagraph D of Paragraph XVII, except the following: Alleges that although it does know the tonnage, at the point of delivery, of the beets produced by plaintiff and delivered to it which were subsequently shipped to its refinery in southern [261] California located at Oxnard, it does not know the tonnage of plaintiff's beets so shipped at the point of commencement of shipment to said refinery at said Oxnard.

(n) Answering the allegations of subparagraph E of Paragraph XVII, alleges that during the crop year 1941 there were three manufacturers who operated sugar beet factories in southern California, to wit, Holly Sugar Corporation, Union Sugar Company, and defendant. Attached hereto, marked Exhibits 1 to 6, inclusive, respectively, and made a part hereof are copies of the contracts in force during said crop year between said manufacturers and the growers in said area.

(o) Admits the allegations contained in subparagraph F of Paragraph XVII, except the following: Denies the allegations set forth on page 4 of the amendment to the complaint commencing at line 14.

with the phrase "Plaintiff is informed and" and ending at line 19 of said page.

(p) Answering the allegations of subparagraph G of Paragraph XVII, admits and alleges that the average joint net return from sugar manufactured in southern California during the cropping year 1941 was greater than the average joint net return from sugar manufactured during the same cropping year in northern California.

(q) Answering the allegations of subsections (b), (c) and (d) of subparagraph H of Paragraph XVII, admits and alleges that payments made to plaintiff for the crop year 1941 [262] were made in manner and form as provided in Exhibit D annexed to the complaint. Admits the allegations contained in subsections (e) and (f) of subparagraph H of Paragraph XVII.

(r) Admits that plaintiff has employed the services of attorneys at law for the purpose of bringing this action.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

* * * *

Acknowledgment of Service attached.

[Endorsed]: Filed March 18, 1949. [263]

[Title of District Court and Cause—No. 8353.]

AMENDMENT TO ANSWER

Pursuant to leave of court first had and obtained, defendant amends its fourth defense herein to read as follows:

Fourth Defense

If defendant was in fact a party to any combination or conspiracy to establish or to maintain a joint price determination factor with reference to the purchase and sale of sugar beets in Northern California, plaintiff at all times during the crop year 1941 knew of the existence of such combination or conspiracy, if any there was, and then and there aided and abetted in the consummation thereof by voluntarily entering into the standard form contract for said year, copy [273] of which is annexed to said complaint as an exhibit, then and there sold its beet crop for said year pursuant to the terms and conditions thereof, and knowingly participated in such combination or conspiracy by agreeing to sell and selling his beets at a price determined by the utilization of such price determination factor.

O'MELVENY & MYERS
PIERCE WORKS
JOHN WHYTE

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed February 21, 1950. [274]

At a stated term, to-wit: The September Term, A.D. 1949, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 9th day of January in the year of our Lord one thousand nine hundred and fifty.

Present:

The Honorable Ben Harrison, District Judge.

[Title of Causes Nos. 4643, 8353.]

MINUTE ORDER

For (1) pre-trial hearing pursuant to order filed Nov. 21, 1949, and (2) motion of plaintiffs in Case No. 4643-BH Civil to strike portions of plaintiffs' complaint as amended, pursuant to notice and motion, filed Dec. 27, 1949; S. M. Arndt, Esq., appearing as counsel for plaintiff; Pierce Works, John Whyte, and Donald S. Graham, Esqs., appearing as counsel for defendant;

The Court makes a statement relative to counsel complying with the pre-trial order in certain respects. Statements are made by Attorneys Arndt and Works. The Court orders motion (2) of plaintiffs in Case No. 4643-BH Civil to strike portions of plaintiffs' complaint as amended, granted, there being no objection thereto by defendant.

The Court and counsel have a further discussion; and the Court orders the trial date of Feb. 7, 1950, vacated, and the causes are re-set for trial Feb. 21, 1950, 10 a.m.

On motion of Attorney Works, it is ordered that Donald S. Graham, Esq., of the law firm of Lewis, Grant, Newton, Davis, and Henry, of Denver, Colorado, is admitted to practice in this Court for the purposes of these cases only and associated with attorneys for defendants herein. [302]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 21st day of February in the year of our Lord one thousand nine hundred and fifty.

Present:

The Honorable Ben Harrison, District Judge.

[Title of Causes Nos. 4643, 8353.]

MINUTE ORDER

For trial; Stanley Arndt, Esq., appearing as counsel for plaintiffs in Case No. 4643-BH Civil and for plaintiff in Case No. 8353-BH Civil; Pierce Works and John Whyte, Esqs., appearing as counsel for defendant in each case; Donald S. Graham, Esq., appearing as associate counsel for defendant; all parties answer ready; whereupon, pursuant to stipulation and order of Court these two causes are consolidated for the purposes of trial.

Attorney Works, for defendants, makes a statement and presents Amendment to Answer in Case

No. 8353-BH Civil, and Amendment to Answer as amended in Case No. 4643-BH Civil, which are filed.

Counsel discuss the matter of an amending of the pre-trial stipulation, filed Jan. 4, 1950, in paragraphs 30 and 31.

The Court makes a statement. Attorney Works makes a statement on behalf of defendants and refers to, and reads from the decision of the U. S. Supreme Court in appeal in Case No. 4643-BH Civil.

Attorney Arndt makes a statement on behalf of plaintiffs. The Court makes a further statement.

At 11 a.m. court recesses. At 11:06 a.m. court reconvenes herein and all being present as before, including counsel for both sides, Court orders trial proceed. [303]

Counsel have a further discussion of the pre-trial stipulation filed Jan. 4, 1950. Plaintiffs' counsel offers in evidence pre-trial stipulation filed Jan. 4, 1950, and it is admitted in evidence subject to correction if any errors appear.

Attorney Arndt reads certain Interrogatories of plaintiffs and Answers of defendant thereto into the record, and makes a statement of the Interrogatories by number and answers thereto which he offers in evidence, and states that he will furnish a typewritten list of Interrogatories of plaintiffs and Answers thereto, each Interrogatory followed by the Answer for the record herein.

At noon court recesses to 2 p.m. today. At 2 p.m. court reconvenes herein and all being present as before, including counsel for both sides, Court orders trial proceed.

Attorney Arndt offers in evidence and reads into the record portions of the deposition of H. E. Zitkowski, (2 vols.) heretofore filed July 8, 1949, and pursuant to Court's order said deposition is opened and filed.

At 3:03 p.m. court recesses. At 3:10 p.m. court reconvenes herein and all being present as before, including counsel for both sides, Court orders trial proceed.

Attorney Arndt offers in evidence and reads into the record portions of the depositions of Lester J. Holmes, heretofore filed June 9, 1949, and Myron W. Hardy, heretofore filed Sept. 19, 1949, and pursuant to Court's order said depositions are opened and filed.

At 4:05 p.m. Court orders further trial of these consolidated causes continued to Feb. 23, 1950, 10 a.m. [304]

[Title of District Court and Cause No. 4643.]

AMENDMENT TO ANSWER AS
AMENDED

Pursuant to leave of Court heretofore had and obtained, defendant amends its eleventh and twelfth defenses herein to read as follows:

Eleventh Defense—Mandeville

11. If defendant was in fact a party to any combination or conspiracy to establish or to maintain a

joint price determination factor with reference to the purchase and sale of sugar beets in Northern California, Mandeville Island Farms, Inc. at all times during the crop years 1939 and 1940 and each of them, [305] knew of the existence of such combination or conspiracy, if any there was, and then and there aided and abetted in the consummation thereof by voluntarily entering into the standard form contracts for each of said years, copies of which are annexed to said complaint as exhibits, then and there sold its beet crop for each of said years pursuant to the terms and conditions thereof, and knowingly participated in such combination or conspiracy by agreeing to sell and selling its beets at a price determined by the utilization of such price determination factor.

Twelfth Defense—Zuckerman

12. If defendant was in fact a party to any combination or conspiracy to establish or to maintain a joint price determination factor with reference to the purchase and sale of sugar beets in Northern California, Roscoe C. Zuckerman at all times during the crop year 1941 knew of the existence of such combination or conspiracy, if any there was, and then and there aided and abetted in the consummation thereof by voluntarily entering into the standard form contract for said year, copy of which is annexed to said complaint as an exhibit, then and there sold his beet crop for said year pursuant to the terms and conditions thereof, and knowingly participated in such combination or conspiracy by

agreeing to sell and selling his beets at a price determined by the utilization of such price determination factor.

O'MELVENY & MYERS,
PIERCE WORKS,
JOHN WHYTE,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed February 21, 1950. [306]

[Title of District Court and Cause—No. 4643.]

STIPULATION AS TO ADDITIONAL FACTS

It Is Hereby Stipulated by and between the parties hereto, subject to the objections hereinafter specified by defendant (which are hereby submitted for the Court's consideration) that the following matters are true, and that the reporter shall add to the transcript of the proceedings herein the contents of this stipulation in such manner as will be most convenient to the Court. The matters stipulated to are as follows:

1. That the books of American Crystal Sugar Company are kept on the basis of a fiscal year ending March 31 of each year; that the net profits of American Crystal Sugar Company [342] before federal income and undistributed profits taxes, but after depreciation, as shown by the books of the company, are as follows:

The year ending March 31, 1935	\$1,400,130.22
The year ending March 31, 1936	1,235,261.49
The year ending March 31, 1937	2,207,707.14
The year ending March 31, 1938	1,469,464.71
The year ending March 31, 1939	592,674.43
The year ending March 31, 1940	1,463,058.87
The year ending March 31, 1941	1,855,574.07
The year ending March 31, 1942	3,500,094.75
The year ending March 31, 1943	2,542,226.66

That the books of said company do not show the net profits as of any date other than March 31 of each year.

Objection

The foregoing facts set forth in the foregoing Paragraph 1 are objected to by the defendant upon the following specified grounds and each of them: That they and each of them are irrelevant and immaterial, do not prove or disprove or tend to prove or disprove any issue in this case, are so remote as regards any triable issue herein as to have no probative value with reference thereto, and involve so many diverse elements bearing no relationship whatever to the issues herein as to make any use of them herein purely speculative and uncertain.

2. That the attached geographical distribution of sales has been prepared by defendant from its books and records and show the geographical distribution of sales from the Oxnard, California, factory; the Missoula, Montana, factory; the Rocky [343] Ford, Colorado, factory; the Grand Island, Nebraska, factory; the Mason City, Iowa, factory; the Chaska,

Minnesota, factory ; and the East Grand Forks, Minnesota, factory of Crystal for the years 1937 to 1942, both inclusive.

3. Attached hereto is a comparative tabulation of net returns from sales of sugar from Crystal, Holly and Spreckels for the years 1937 through 1942. The data for Holly and Spreckels was furnished by said corporations respectively.

Dated: April 13, 1950.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiff.

O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for Defendant. [344]

GEOGRAPHICAL DISTRIBUTION OF SALES OF OXNARD, CALIFORNIA, FACTORY
FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Arizona.....	12,089	8,659	8,841	20,068	22,232	14,030
Arkansas.....	600	9,800	53,150	18,900	9,800	600
California—North.....	800	.....	200	1,987	.....	133,800
California—South.....	292,224	231,135	307,206	516,403	454,740	444,352
Colorado.....	4,980	.....	1	16	254	2,545
Connecticut.....	.....	.....	.....	.....	2,200	1,198
District of Columbia.....	.....	.....	2,000	.....	2,400	.....
Illinois.....	.....	.....	116,619	120,932	14,651	34,358
Indiana.....	.....	.....	1,600	2,400	8,000	7,236
Iowa.....	5,148	12	2,400	800	1,619	33,758
Kansas.....	600	.....	4,475	644	615	8,000
Louisiana.....	.....	600	600	.....	.....	.....
Maryland.....	.....	.....	26,074	.....	6,707	5,800
Massachusetts.....	.....	.....	21,302	19	11,400	2,098
Michigan.....	.....	.....	.....	.....	378	10,816
Minnesota.....	4,885	.....	3,293	10,825	11,911	33,442
Missouri.....	2,400	.....	19,808	5,030	7,575	7,975
Nebraska.....	1,760	.....	.....	5,334	1,660	11,096
Nevada.....	.....	.....	.....	.....	900	.....
New Hampshire.....	.....	.....	.....	.....	800	.....
New Jersey.....	.....	1,597	4,381	.....	7,200	4,901
New Mexico.....	25,712	44,274	21,540	12,590	3,100	6,775
New York.....	.....	6,000	159,237	303	51,429	32,738
Ohio.....	.....	.....	.....	.....	17,164	10,588
Oklahoma.....	35,600	76,334	110,766	119,175	53,752	14,087
Oregon.....	1,754	.....	37,598	.....	.....	6,390
Pennsylvania.....	.....	.....	15,787	.....	33,150	29,094
Rhode Island.....	.....	.....	.....	.....	800	.....
South Dakota.....	.....	.....	.....	.....	.....	600
Tennessee.....	.....	.....	1,200	.....	.....	.....
Texas.....	23,210	81,158	272,349	131,299	42,252	21,288
Virginia.....	.....	.....	.....	.....	1,400	.....
Washington—Coast.....	36	.....	600	1	10,000	1,491
Washington—Inland.....	.....	.....	3,200	.....	.....	2,217
West Virginia.....	.....	.....	.....	.....	6,995	5,825
Wisconsin.....	1,107	.....	1,600	.....	600	11,258
Total.....	412,905	459,569	1,195,827	966,726	785,684	898,356

GEOGRAPHICAL DISTRIBUTION OF SALES OF MISSOULA, MONTANA, FACTORY
FOR CROP YEARS 1937-1942

State	1937	1938	1939	1940	1941	1942
Idaho.....	24,808	23,385	12,943	6,095	5,556	5,393
Illinois.....	2,856	12,254	53,083	37,748	50,555	12,201
Indiana.....	600	1,880	16,250	.....	5,624	2,432
Iowa.....	29,236	8,018	1,078	1,450	1,920	7,258
Kansas.....	.....	450	.....	.....	580	.....
Kentucky.....	.....	.....	.....	.....	.....	1,100
Maryland.....	.....	.....	.....	.....	1,150	800
Massachusetts.....	.....	.....	.....	.....	800	.....
Michigan.....	.....	600	6,600	2,400	200	1,898
Minnesota.....	27,353	26,868	73,290	114,342	81,026	42,260
Missouri.....	.....	.....	.....	.....	800	5,000
Montana.....	109,841	131,264	180,375	74,298	95,323	55,435
Nebraska.....	7,878	.....	.....	600	14,932	468
New Jersey.....	.....	.....	.....	.....	1,600	.....
New York.....	.....	.....	.....	.....	5,000	11,800
North Dakota.....	16,826	28,230	48,593	40,628	33,984	18,422
Ohio.....	.....	.....	2,400	.....	3,225	4,271
Pennsylvania.....	.....	.....	.....	.....	6,650	6,863
South Dakota.....	31,648	41,002	54,530	38,233	26,246	18,050
Virginia.....	.....	.....	.....	.....	880	.....
Washington—Coast.....	.....	.....	.....	.....	543	3,002
Washington—Inland.....	29,033	29,072	22,648	12,523	27,805	30,058
West Virginia.....	169	.....	.....	.....	675	5
Wisconsin.....	3,600	2,645	44,612	42,620	72,925	22,073
Total.....	283,848	305,668	516,402	370,937	437,999	248,789

GEOGRAPHICAL DISTRIBUTION OF SALES OF ROCKY FORD, COLORADO, FACTORY

FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Arkansas.....	.....	600	.....	.....	.....	800
Colorado.....	80,638	82,885	86,455	126,031	143,383	110,442
Connecticut.....	.....	.....	.....	.....	2,400	.....
District of Columbia.....	.....	.....	.....	.....	800	.....
Illinois.....	1,918	66,349	744	2,000	25,181	44,844
Indiana.....	.....	12,600	18,600	.....	800	4,400
Iowa.....	38,492	26,493	651	.....	5,593	19,972
Kansas.....	37,051	98,124	130,468	104,720	68,527	57,218
Kentucky.....	.....	.....	800	.....	.....	.....
Maine.....	.....	.....	.....	.....	1,600	.....
Maryland.....	.....	.....	.....	.....	3,400	1,000
Massachusetts.....	.....	.....	.....	.....	5,400	.....
Michigan.....	747	5,046	15,800	.....	1,084	17,652
Minnesota.....	1,135	7,000	2,988	877	10,202	1,697
Missouri.....	41,800	73,494	105,867	115,714	148,212	82,330
Nebraska.....	600	.....	.....	1,168	4,581	.....
New Jersey.....	.....	.....	.....	.....	7,706	.....
New Mexico.....	14,110	30,092	39,906	19,394	4,810	10,416
New York.....	.....	.....	.....	.....	25,096	18,017
Ohio.....	.....	4,800	5,600	.....	10,400	7,862
Oklahoma.....	31,900	6,000	400	6,900	6,812	48,164
Pennsylvania.....	.....	.....	.....	.....	8,000	23,374
Rhode Island.....	.....	.....	.....	.....	1,775	.....
South Dakota.....	600	.....	2,400	.....	600	.....
Tennessee.....	.....	800	.....	.....	.....	.....
Texas.....	1,200	600	.....	600	.....	26,704
Vermont.....	.....	.....	.....	.....	800	800
Virginia.....	.....	.....	.....	.....	4,400	.....
West Virginia.....	.....	.....	.....	.....	1,800	847
Wisconsin.....	3,201	22,159	7,007	.....	10,925	3,796
Total.....	253,392	437,042	417,686	377,404	504,287	480,335

GEOGRAPHICAL DISTRIBUTION OF SALES OF GRAND ISLAND, NEBRASKA, FACTORY
FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Connecticut.....	.....	.....	.....	.....	2,400	.....
Illinois.....	.....	7,206	59,488	8,800	6,400	21,110
Indiana.....	.....	600	26,384	4,806	.....	.....
Iowa.....	2,410	1,200	.....	1,064	6,435	11,130
Kansas.....	.....	600	.....	.....	600	.....
Louisiana.....	.....	.....	.....	.....	.....	799
Maryland.....	.....	.....	.....	.....	1,800	.....
Massachusetts.....	.....	.....	.....	.....	1,600	.....
Michigan.....	.....	.....	6,800	.....	.....	.....
Minnesota.....	.....	6,473	6,050	3,800	1,200	3,400
Missouri.....	600	600	2,000	1,200	1,800	2,071
Nebraska.....	144,478	214,452	318,126	314,970	204,547	171,232
New York.....	.....	.....	.....	.....	8,350	6,200
North Dakota.....	.....	.....	.....	.....	.....	300
Ohio.....	.....	.....	2,400	.....	3,000	2,225
Pennsylvania.....	.....	.....	.....	.....	3,400	7,692
South Dakota.....	4,200	6,600	7,600	8,400	4,800	4,825
Virginia.....	.....	.....	.....	.....	1,600	.....
Wisconsin.....	.....	3,200	10,850	3,600	.....	2,400
Total.....	151,688	240,931	439,698	346,640	247,932	233,384

GEOGRAPHICAL DISTRIBUTION OF SALES OF MASON CITY, IOWA, FACTORY
FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Illinois.....	.....	6,499	42,731	5,115	2,391	1,719
Indiana.....	.....	.....	800	.....	.....	3,701
Iowa.....	170,339	292,580	395,058	332,822	346,497	200,545
Maryland.....	.....	.....	.....	.....	900	1,608
Massachusetts.....	.....	.....	.....	.....	800	800
Michigan.....	.....	.....	.....	400	.....	.....
Minnesota.....	13,753	9,450	19,800	32,033	36,447	34,753
Missouri.....	550	.....	.....	.....	.....	.....
New York.....	.....	.....	.....	.....	.....	5,101
Ohio.....	.....	.....	.....	.....	.....	4,301
Pennsylvania.....	.....	.....	.....	.....	.....	11,927
South Dakota.....	.....	.....	.....	600	.....	.....
West Virginia.....	.....	.....	.....	.....	.....	1,800
Wisconsin.....	1,525	2,150	7,907	13,022	12,875	35,202
Total.....	186,167	310,679	466,296	383,992	399,910	301,457

GEOGRAPHICAL DISTRIBUTION OF SALES OF CHASKA, MINNESOTA, FACTORY

FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
California—North.....	1	.....	.....	.....	1	.....
California—South.....	2	.....	.....	.....	1	.....
Illinois.....	.....	.....	800	1,627	.....	3,400
Indiana.....	.....	.....	.....	.....	800	.....
Iowa.....	.....	9,253	9,184	5,255	1,528	1,405
Maryland.....	.....	.....	.....	.....	800	.....
Michigan.....	5,435	4,363	3,850	2,950	.....	.....
Minnesota.....	120,440	190,494	219,892	220,410	199,067	201,135
Missouri.....	250	.....	.....	.....	.....	.....
Montana.....	1	.....	.....	.....	1	.....
New York.....	.....	.....	.....	.....	800	4,980
North Dakota.....	.....	.....	27	.....	.....	.....
Ohio.....	.....	.....	.....	.....	842	800
Pennsylvania.....	.....	.....	.....	.....	1,600	3,400
South Dakota.....	.....	.....	600	.....	.....	.....
West Virginia.....	.....	.....	.....	.....	800	800
Wisconsin.....	43,020	74,201	80,579	79,966	39,883	27,583
Total.....	169,149	278,311	314,902	310,208	246,123	243,503

GEOGRAPHICAL DISTRIBUTION OF SALES OF EAST GRAND FORKS, MINNESOTA, FACTORY
FOR CROP YEARS 1937 - 1942

State	1937	1938	1939	1940	1941	1942
Illinois.....	.....	3,200	.....	800	.....	15,695
Indiana.....	.....	.....	.....	.....	.....	2,712
Iowa.....	.....	1,200	.....	.....	.....	.....
Kentucky.....	.....	.....	.....	.....	.....	1,100
Maryland.....	.....	.....	.....	.....	1,000	.....
Massachusetts.....	.....	.....	.....	.....	.....	1,000
Michigan.....	1,250	3,099	687	.....	2,500	5,079
Minnesota.....	305,489	418,953	414,926	392,071	335,780	316,216
New Jersey.....	.....	.....	.....	.....	800	.....
New York.....	.....	.....	.....	.....	1,000	8,981
North Dakota.....	84,805	108,566	98,183	110,834	95,002	56,458
Ohio.....	.....	.....	.....	.....	.....	4,633
Pennsylvania.....	.....	.....	.....	.....	.....	11,745
South Dakota.....	8,400	8,800	3,600	600	1,200	3,087
Virginia.....	.....	.....	.....	.....	967	.....
West Virginia.....	.....	.....	.....	.....	.....	1,600
Wisconsin.....	22,760	20,274	21,580	20,364	28,789	79,503
Total.....	422,704	564,092	538,976	524,669	467,038	507,809

RETURNS FROM SALES OF SUGAR

1939

Spreckels	Joint	Crystal
\$4.4328	\$4.388	\$4.450
.5350	.535	.535
.5409	.479	.387
.0053	.009	.014
.0157	.021	.078
.0656	.060	.113
.0519	.053	.065
.0507	.051	.048
.0640	.049	.047
<u>\$3.1037</u>	<u>\$3.131</u>	<u>\$3.163</u>

1942

Crystal	Holly	Spreckels
\$5.313	\$5.555*	\$5.4916
.535	.535	.5350
.257	.373	.3741
.013	.....	.0095
.057	.....	.0332
.034	.....	.0596
.076	.....	.1015
.038	.....	.0434
.057	.....	.1043
<u>\$4.246</u>	<u>\$4.647**</u>	<u>\$4.2310</u>

[Title of District Court and Causes—4643-8353.]

STIPULATION AS TO CERTAIN FACTS

It Is Hereby Stipulated by and between the parties that the mathematical results of applying the average of the 1937-1938 Crystal-Clarksburg “net returns” to the 1939, 1940 and 1941 sugar beets actually delivered by Mandeville, Zuckerman and Evans, instead of applying the respective 1939, 1940 and 1941 joint net returns, would result in amounts in excess of those actually received by the respective plaintiffs, as follows: [356]

(a) 1939	Mandeville	\$15,749.51
(b) 1940	Mandeville	14,321.61
(c) 1941	Zuckerman	nothing
(d) 1941	Evans	nothing

Dated: Dec. 20, 1950.

WOOD, CRUMP, ROGERS &
ARNDT,

/s/ By STANLEY M. ARNDT,
Attorneys for Plaintiffs.

O'MELVENY & MYERS,
DONALD S. GRAHAM,
PIERCE WORKS,
JOHN WHYTE,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

[Endorsed]: Filed December 26, 1950. [357]

[Title of District Court and Causes—4643-8353.]

MEMORANDUM OPINION

This memorandum is a sequel to *Mandeville Farms et al. vs. American Crystal Sugar Co.*, 334 U. S. 219, wherein I was reversed (64 F. Supp. 265). As I understand the prevailing opinion of the court, the raising and sale of sugar beets to refineries within the state to be processed into sugar within the state constitutes interstate commerce and in the purview of the Sherman Anti-Trust Act. Thus the man with five acres of grapes who sells the same to a winery, who thereafter allows his wine to enter into the stream of interstate commerce, comes [358] within the protection of the anti-trust laws of the nation.

However, the Supreme Court has spoken and there remains nothing further for me to do but fix damages. While it is not possible for this court to fix damages to that degree of certainty that one would hope for, the plaintiffs have suffered damages and under the law should be compensated therefor.

I fix *Mandeville Island Farms, Inc.*, damages at the sum of \$29,771.12; Mr. Zuckerman's at the sum of \$3,528.00 and Mr. Evans' at the sum of \$1,100.00. These amounts represent actual damages and under the law the above amounts will be trebled.

The sum of \$25,000.00 I find is a reasonable amount to be allowed attorneys for plaintiffs.

The amounts allowed are arrived at as follows:

For the years 1939 and 1940, I have allowed the average prices paid for the years 1937 and 1938;

For the year 1941, I have allowed as damages the

sum of 25c per ton. I do not feel justified in using the prices for 1942 as a basis for damages. Such an abnormal year should not be used as a proper guide in fixing actual damages. I believe the amounts so allowed are on the conservative side.

Plaintiffs' counsel is directed to submit to me proposed findings and judgment.

Dated: This 21st day of December, 1950.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed December 21, 1950. [359]

[Title of District Court and Causes—4643-8353.]

**DEFENDANT'S OBJECTIONS TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW PREPARED BY PLAINTIFFS**

Defendant objects to the proposed Findings of Fact heretofore filed in these causes in the following particulars, each objection being designated by the number of the proposed finding to which objection is being made: [360]

1. This proposed finding appears to be an attempt to incorporate as a finding all of the facts to which the parties have stipulated. If it be proposed to have the court adopt as findings of fact facts to which the parties have stipulated, a selection of pertinent ones should be made and specifically proposed as findings. The finding in its present form is uncertain and indefinite. If there are any conflicts, as the finding seems to assume, between the findings

and the stipulated facts, now is the time to resolve them.

8. Defendant objects to that portion of the proposed finding beginning with the new sentence in line 15 to the end of the finding on the grounds that:

(a) The references to "California" and to "other parts of the United States in which Crystal purchased sugar beets and operated sugar factories" (lines 17-18) are irrelevant, the defendant's operations in Northern California being the only ones material to the disposition of the case. And the evidence does not show, as to parts of the United States other than California, any of the facts set forth in lines 15-25 of the findings.

(b) Plaintiffs wholly failed to prove that "the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar" were intermingled with, or directly affected or had any direct relation to "the distribution of sugar in interstate commerce."

(c) The wording of lines 15-28 of the proposed finding apparently has no limitation as to companies [361] involved, but includes all processors of beet sugar. The evidence does not justify a finding as to the activities of processors other than defendant and the other Northern California processors.

9(a). The second sentence is inaccurately phrased, and, in any event, is superfluous and immaterial.

9(c). There is no evidence in the record to support the provisions "or beet sugar refined in one refinery from that refined in another refinery" (lines 3-4, page 8). And compare the language with

that in lines 28-30, page 16. Furthermore, none of this finding has any bearing on the issues in the case.

9(e). There is no evidence to warrant a finding that a grower of sugar beets in Northern California could not sell sugar beets "at a profit except to one of said manufacturers". The parties have stipulated that "The only practicable market available to plaintiffs and other beet growers in California north of the 36th parallel during the crop years 1938-1941 was sale to one or more of the companies having factories in California". (1 Tr. 40.) The evidence shows no more.

Defendant objects to the last sentence in the paragraph as not essential to the decision of the court.

9(f). The proposed finding, if necessary at all, should be limited in scope to Northern California.

9(i). The first sentence is inaccurate in that growers might, and did, grow beets for more than one processor in a season. [362]

9(k). Defendant objects to this proposed finding on the following grounds:

(a) The language in line 16 "of the sale of the sugar content of beets" is inaccurate, since the sale involved is that of the sugar produced from such beets.

(b) The full sentence contained in lines 18 and 19, "This method was in general use wherever Crystal operated", is immaterial.

(c) The language in lines 19 and 20 "During the years 1937 and 1938 (when competitive conditions existed in Northern California)" is improper as in-

ferring, although the evidence does not show, that there were not competitive conditions in various phases of the industry in the years 1939, 1940 and 1941. Furthermore, the proposed finding infers, contrary to fact, that the so-called "profit-sharing" concept of the contract existed only in 1937 and 1938, and not in 1939, 1940 and 1941.

11. Defendant objects to this proposed finding on the following grounds:

(a) The full sentence found in lines 25-27 covers the entire state of California, and to the extent it involves more than Northern California, it is not essential to the disposition of the case. Similarly, the language in lines 27-29 "During said years growers in Southern California were paid on the average net return of the Southern California factories and" is immaterial. [363]

(b) That portion of the proposed finding beginning with a new sentence in line 30, page 11, and continuing through line 4 on page 12, encompasses the entire state of California, and should be limited to Northern California.

12. (lines 5-17). The language in lines 5-7, "at a time unknown to plaintiffs but particularly within the knowledge of defendant, but which defendant did not disclose to the plaintiffs or to the court" is immaterial since defendant admitted an agreement with Holly and Spreckels to pay growers, using as one variable, the joint net return from the sales of sugar from the three companies' Northern California factories, and the quoted language has no bearing on the issues or on the ultimate conclusion

of the court. As a further objection to this portion of the proposed finding, there is no evidence or evidence from which it would be proper to infer the existence of any agreement between the alleged conspirators as to anything except the use of the joint net return, as aforesaid.

The word "Crystal" in lines 15 and 16 should be "Spreckels".

12(c). Defendant objects to line 29, page 12, through line 4, page 13, on the ground that plaintiffs wholly failed to prove that there was no competition between the defendant, Holly and Spreckels during the crop years 1939, 1940 and 1941; on the contrary, defendant's evidence showed highly competitive conditions in the sale of sugar between these companies during said period of time. Defendant objects to the last sentence of this proposed finding since the method of paying growers in Southern [364] California is immaterial to the disposition of the cases.

12(d). Defendant objects to this proposed finding on the following grounds:

(a) The language in lines 7 and 8 "Instead of paying the growers of sugar beets a reasonable price for their beets" is followed by language which is a non sequitur.

(b) The language beginning in line 15 and continuing into line 16 "A similar method was used during said years throughout Southern California" relates to a matter which is immaterial to the disposition of the case.

12(g). Objected to as being both hypothetical and argumentative.

12(h). The activities of the sugar companies in Southern California are not germane to the decision which has been made by the court.

12(i). The record is devoid of evidence to sustain this finding, which enlarges the combination or conspiracy beyond anything alleged or proven.

13(b). This proposed finding is irrelevant to the disposition of the case.

14, 15. Defendant objects to these proposed findings and each of them on the grounds that: [365]

(a) Any findings with reference to the Secretary of Agriculture's determinations are irrelevant to and go wholly outside of the issues. It will be recalled that counsel for plaintiff himself moved to amend his pleadings by eliminating this matter, and the motion was granted. (Tr. of Jan. 9, 1950, pp. 17, 20.)

(b) The references to Southern California plants and to the Arkansas Valley of Colorado are immaterial.

16. The references to Southern California and to the Arkansas Valley in Colorado, and the expression "elsewhere in other states of the United States" are irrelevant and immaterial. (It is assumed that in line 24 the years 1939, 1940 and 1941 are intended instead of the years 1940, 1941 and 1942.)

Defendant objects to the reference in line 6 on page 17 to the term "pooled net return" as being inaccurate language and as being without foundation in the evidence.

17. This proposed finding ignores that portion of the evidence in the testimony of Mr. W. N. Wilds, President of defendant, that he was the one who made the final decision as to the change from the 1938 form to the 1939 form of contract in Northern California (pages 70 and 94 of deposition of W. N. Wilds and others).

18. Defendant objects to lines 6-14 of this proposed finding on the ground that they are so drawn as to raise an inference that there was no competition among the processors of [366] sugar in Northern California during the crop years 1939, 1940 and 1941 as to performance, ability and deficiency of their manufacturing, sales and executive departments. Plaintiffs wholly failed to prove that competition did not continue between the companies during the years in litigation, and evidence of the defendant clearly showed that such competition did exist. The reference to 1938 prices to the growers covers matters which are merged in the findings as to damages; but if these references are deemed material, the finding should also, in all fairness, embrace the fact that in 1937 (the other year utilized by the court as a damage yardstick), and amount paid by each company per average ton of beets (16% sugar content) was Holly \$5.138, Crystal \$5.106 and Spreckels \$5.078.

20. The first sentence, which is repetitious of statements of similar import contained in other proposed findings to the effect that during the crop seasons 1939, 1940 and 1941 competition between de-

fendant, Holly and Spreckels no longer existed, is without foundation in the evidence.

That portion of the proposed finding beginning with the new sentence on line 15, page 19, and continuing through the sentence which ends on line 3, page 20, has no relationship to the decision of this court. The fallacy of attempting to show damage to plaintiffs based on over-all earning figures of defendant is apparent, a completely unreliable method of measuring damages, and one presumably given no consideration by the court. Furthermore, this portion of the proposed finding contains inaccurate representations, since the so-called "50-50" division between the processor and the grower (which concept is only an approximation) relates to the net returns received from the [367] sale of sugar. The net return from sugar, as clearly appears from the evidence in the case, is a figure arrived at by deducting from the gross sales price of sugar certain specified marketing expenses; no manufacturing costs enter into the picture and no other activities of the processor such as agricultural undertakings, sales of by-products, etc., have a place in the so-called "50-50" formula reflected in the schedule of beet prices in the various contracts of defendant. An analysis of the data in evidence shows that the "profit-sharing" arrangement relates to net returns from sugar sold, and the processor might lose money on its over-all operations and yet there would be a "net return" figure. Thus, the portion of the finding in question proceeds on an erroneous premise, and one having

no foundation in the evidence of the case. Furthermore, the finding is wholly unessential.

The use in line 6, page 20, of the words "when there was free competition" is an attempt to color and is not in the nature of a judicial finding of fact, since, as mentioned above in connection with several other objections, plaintiffs wholly failed to prove that there was not competition during the years 1939, 1940 and 1941. Too, the balance of the proposed finding ignores the substantial evidence presented by defendant to show that during the crop years 1939, 1940 and 1941 defendant had bumper crops of sugar at Clarksburg, and that due to this fact defendant had to find markets farther from the factory than had been necessary in 1938 or was necessary in 1942 (see pages 359, 399, 402, 419, 433 Daily Transcript).

21. That portion of this finding contained in line 26, page 20, through line 7, page 21, contains the same unfounded statement as that objected to in connection with other proposed [368] findings to the effect that defendant and other Northern California companies no longer produced and sold sugar in interstate commerce in competition with each other as they had done prior to 1939, 1940 and 1941, the plaintiffs having failed to show this to be so and defendant having shown it was not so. Furthermore, the statement in lines 3 and 4, page 21 that "they pooled their receipts and expenses" is wholly unwarranted by the evidence. Nor is there any foundation whatsoever in the evidence for the statement con-

tained in the sentence beginning on line 7 and ending on line 12 of page 21.

That portion of the proposed finding beginning with the sentence in line 27, page 21, and continuing to the end of the proposed finding ignores the important, apparent fact that to assume that the Company deliberately lost money is contrary to all reason; furthermore, this portion of the finding is directly counter to the evidence which showed continuing keen competition in sugar operations between the companies during the years 1939, 1940 and 1941.

22. The court has stated in its Memorandum Opinion that "There remains nothing further for me to do but fix damages", thus indicating that this court believes that the decision of the Supreme Court has precluded any further inquiry into the question of whether the agreement to use the joint net had the effect on interstate commerce to bring it within the purview of the Sherman Act; consequently, if the court is making its determination as to the effect of the agreement in question on interstate commerce on the basis of what it considers a mandate from the Supreme Court, the Findings of Fact or Conclusions of Law should reflect this [369] fact.

23. The references in this proposed finding to Southern California and to other portions of the United States outside of Northern California are immaterial.

24. This language disregards the showing made in the evidence that during the years in question the

government controlled the acreage planted to beets, and also controlled, by marketing allotments, the quantity of sugar distributed. (See defendant's Exhibits A, B and J.)

25. This finding is repetitious of materials contained in previous proposed findings of fact, (see Nos. 9(d) (e) (f) (g) (i) (j)). And the language in lines 17 through 19 pertaining to the control over the quantity of beets grown and the quantity of sugar sold fails to take into account the matters of government control over acreage and sugar sales referred to in the objection to proposed finding No. 24.

26. Defendant objects to this proposed finding on the ground that plaintiffs have wholly failed to show any lessening of competition "in the later interstate phases of over-all activity", or that "the effects in those phases had repercussions upon the prior ones, including the price received by the growers." Similarly, the record is devoid of evidence showing that the agreement to use the joint net as one of the variables in the formula used in paying for beets "reduced competition in the interstate distribution of sugar" as stated in this finding (line 8, page 24). The evidence was wholly to the contrary. [370]

27. This proposed finding ignores (a) the showing made by defendant as to the control exercised by the government both on the beet acreage and on the sales of sugar during the period in question (see objections to proposed finding No. 24); and (b) the fact that the evidence fails to show any relation-

ship between the interstate distribution of sugar and the price paid for beets.

31. This proposed finding has no relevancy to the issues tried in the case or to the disposition which has been made by the court. The relevancy, if any, would be in connection with the accounting portions of the complaint, which are not involved in these findings.

32. Plaintiffs have wholly failed to show that the alleged conspiracy had any effect whatsoever upon the sale of sugar in interstate commerce "in competition with the sugar of the co-conspirators"; rather, the evidence clearly shows that there was strong competition between the defendant and the other processors of sugar in the sales of sugar throughout the period in question. Defendant further objects to this finding as repetitious of 12(f).

33. The evidence is devoid of any showing that "interstate commerce in sugar was illegally restrained" or restrained at all, or that competition in connection with the interstate shipment of sugar was in any way lessened. And see objection to proposed finding No. 22.

35. This proposed finding is repetitious of proposed [371] finding No. 3.

40(c). Defendant objects to this finding as not based on evidence and as not being a proper inference to be drawn from the evidence, but defendant assumes that the decision which has been made by the court necessarily adopts the reasoning reflected in this finding.

40(d). Defendant objects to this proposed finding on the following grounds:

(a) "net sales" (line 6) probably means "net returns" or "net sales returns".

(b) the words (lines 6-7) "net sales from all of the beets delivered by plaintiffs to defendant" have no meaning, but assuming that it is intended to mean, in substance, that the net returns of Crystal's Clarksburg factory during the years 1939, 1940 and 1941 did not include the net returns from all sugar produced from beets delivered by plaintiffs to defendant, defendant objects to the proposed finding on the ground that it has no relevancy to any issue tried by the court or to the disposition of the case, since it relates purely to the accounting phase.

40(e). The practice referred to was carried on both before and after the alleged conspiracy, and the finding has relevancy, if any, only in connection with the accounting counts of the plaintiffs' complaints. The practice of shipping beets to Oxnard from the Clarksburg area is not shown in any way to have been related to the use of the joint net return of the Northern [372] California processors as a part of the formula used in paying for beets. Defendant further points out the inaccuracy of that portion of this proposed finding beginning with the word "yet" in line 8, page 31, to the end of the proposed finding, in that net return figures do not take into account "total beets delivered", and that this portion of the finding is not in accordance with the facts as shown by the evidence.

40(f). This proposed finding has no relevancy to the issues tried by the court, its relevancy, if any, being to the accounting portions of the plaintiffs' complaint, not here involved. The evidence shows that the carrying over of sugar from one crop year to another, as done in the years 1939, 1940 and 1941, was also practiced both before and after those years. Furthermore, the evidence clearly shows that the defendant did not exercise "exclusive control as to when sugar was sold and whether sugar of one year was sold that year or in a subsequent year", since, during the crop years 1939, 1940 and 1941 there were government controls on the sale of sugar (see defendant's Exhibit J), with the result that defendant was not a free agent in determining the times at which sugar would be sold.

40(g). Defendant objects to this proposed finding on the ground that the operations at Oxnard have no relevancy to the case; that the practice alluded to in the proposed finding is one which existed both prior to and after the crop years 1939, 1940 and 1941; and that the plaintiff has completely failed to show any connection between the practice and the alleged conspiracy. [373]

In lieu of said findings and in lieu of the conclusions of law and judgment proposed by plaintiffs herein, defendant respectfully presents the accompanying and proposed findings of fact, conclusions of law and judgment, which in the belief of defendant accurately reflect the issues actually tried by the Court, the findings of the Court thereon and the

Court's conclusions and decision with reference thereto.

Dated: January 19, 1951.

Respectfully submitted,

DONALD S. GRAHAM,
O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 19, 1951. [374]

[Titles of District Court and Causes—4643-8353.]

**OBJECTIONS TO SECOND DRAFT OF
PLAINTIFFS' PROPOSED FINDINGS OF
FACT, CONCLUSIONS OF LAW AND
JUDGMENT**

Defendant respectfully renews its objections heretofore filed with reference to the first draft of proposed findings of fact, conclusions of law and judgment heretofore filed by plaintiffs as to all portions of said first draft therein objected to and reproduced in the second draft now on file; and

Defendant further objects to said second draft of [376] findings upon the ground that the same is replete with conclusions and surplusage, does not correctly reflect the case as actually tried, and does not comply with the instructions heretofore given

by the Court with reference to its preparation. In this connection defendant respectfully suggests that in order to correctly reflect the holding of the Court, the findings herein, the conclusions of law and the judgment to be rendered should in substance embrace the following, and that any other matters are pure surplusage and relate to matters not actually tried:

1. Findings as to jurisdictional facts.
2. Findings as to material facts admitted by the pleadings.
3. A finding that the sugar beets involved were planted, grown, harvested and processed by defendant into sugar wholly within the State of California, and that the sugar manufactured therefrom was thereafter transported and sold both in interstate and intrastate commerce.
4. A finding that defendant entered into and, during the crop years 1939, 1940 and 1941 actively participated in and maintained a combination and conspiracy to fix the price of sugar beets purchased by it for processing, through the methods and means of utilizing, with two other sugar processors, a common price determination factor, namely, the joint average net return for sugar sold during a given crop year from the Northern California factories of said three processors.
5. A finding that such combination and conspiracy was in restraint of trade.
6. A finding that each of the three plaintiffs

[377] suffered damage, in specified amounts, resulting from such combination and conspiracy.

7. A conclusion of law to the effect that this Court regards the holding of the Supreme Court on the previous appeal binding upon it as the law of the case and for this reason concludes that the activities found had a substantial effect upon interstate commerce and hence comes within the purview of the Anti-Trust laws.

8. A conclusion of law to the effect that this Court is unable to find, from the evidence, that the activities found had any effect upon the price, supply or competitive conditions with reference to sugar.

9. Judgment for damages, trebled, and for attorneys' fees.

10. Judgment of dismissal of the second and third counts in Action No. 4643, with prejudice.

It is further respectfully suggested that findings of fact, conclusions of law and a judgment along the lines above suggested would fairly and accurately reflect both the case as actually tried and the grounds of the Court's decision.

Dated: February 5, 1951.

DONALD S. GRAHAM,
O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed February 5, 1951. [378]

[Title of District Court and Causes—4643-8353.]

OBJECTIONS TO THIRD DRAFT OF PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND SUGGESTIONS AS TO AMENDMENTS

Defendant respectfully specifies, as being applicable to said Third Draft, each and every objection heretofore specified by it, by its objections duly filed herein on February 5, 1951, to plaintiffs' Second Draft of Proposed Findings of Fact, [380] Conclusions of Law and Judgment.

In addition to the foregoing, defendant respectfully suggests the following modifications of said Third Draft by way of additions thereto or deletions therefrom:

1. Delete that portion of paragraph 5 commencing at page 6, line 7 and ending at page 6, line 18, and reading as follows:

“The various steps involved in the production and sale of beet sugar in California during the years here involved, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar and the sale and distribution of sugar in interstate commerce to the ultimate consumer, were at all times herein mentioned and now are intermingled with and directly affected by each other and had and have a direct relation upon each other. Each of said steps was at all times herein mentioned and now is a part of a transaction that commenced when the ground was prepared for planting the sugar beet seed and was

completed when the sugar was delivered to the purchaser.”

2. Add to paragraph 6(c) at page 8, line 12, the following:

“The beets, however, including the beets purchased from plaintiffs during 1939, 1940 and 1941, all as hereinafter found, were planted, grown, harvested and processed into sugar wholly within the State of California.”

3. In paragraph 9 at page 11, lines 9-10, delete the following: [381]

“and commerce among the several states. . . .”

4. At page 11, line 9 and page 11, line 10, delete the misplaced conclusion of law: “unlawfully”.

5. At page 11, lines 11-12, delete the misplaced conclusion of law:

“all in violation of the anti-trust laws of the United States”.

6. At page 11, line 12, delete the misplaced conclusion of law: “unlawful.”

7. Delete Paragraph 11 at page 13, lines 6 through 10.

8. Delete that portion of Paragraph 12 commencing at page 13, line 11 and ending at page 13, line 24, and reading as follows:

“As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and the other said manufacturers in Northern California producing and selling sugar in interstate commerce from beets raised in Northern California in competition

with each other as they had previously done, they became illegally associated in a combination and conspiracy wherein they ceased to compete in interstate commerce and fixed prices paid growers and paid the beet growers upon a method the effect of which [382] was the same as if they had pooled their receipts and expenses. They thus frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed in said Northern California in 1937 and 1938 prior to said conspiracy.”

9. Delete from Paragraph 18-C-1 at page 16, line 32: “not less than”.

10. Delete from Paragraph 18-C-2 at page 17, line 2: “at least”.

11. Delete from Paragraph 18-C-3 at page 17, line 4: “not less than.”

12. Delete from Paragraph 18-D at page 17, line 8, the misplaced conclusion of law: “unlawful”.

13. Delete from Paragraph 18-D at page 17, line 14 and page 17, line 16: “at least”.

14. Delete from Paragraph 18-D at page 17, lines 19-20:

“These amounts as found herein are on the conservative side.”

15. Revise Paragraph 19 at page 17, lines 23-29 to read as follows:

“By reason of the foregoing acts of the defendant and its said conspirators, competition in sugar beets [383] and the purchase thereof was substantially lessened and the price of sugar beets was fixed, to the damage of plaintiffs as aforesaid.”

16. Delete Paragraph 26 at page 20, lines 1-3.

17. Delete Paragraph 1 of the Conclusions of Law at page 20, lines 11-13.

18. From Paragraph numbered 2 of the Conclusions of Law delete the period at page 20, line 16 and add the following:

“; and for this reason the Court concludes and declares that the activities hereinabove found constituted a combination and conspiracy within the purview of the Anti-Trust laws of the United States, and hence unlawful.”

19. Delete Paragraph numbered 10 of the Conclusions of Law and substitute therefor the following:

“No evidence having been introduced under the second and third counts in Action No. 4643, the same and each of them should be dismissed with prejudice.”

(And the proposed judgment should be modified accordingly.)

Dated: February 15, 1951.

Respectfully submitted,

DONALD S. GRAHAM,
O'MELVENY & MYERS,

/s/ By PIERCE WORKS,
Attorneys for Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed February 16, 1951. [384]

[Title of District Court and Causes—4643-8353.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cases having been duly consolidated for trial, came on regularly for trial and were tried before the Honorable Benjamin Harrison, United States District Judge, a jury having been waived by all parties. Plaintiffs appeared by Wood, Crump, Rogers and Arndt (by Stanley M. Arndt, Esq.), their attorneys, [386] and defendant appeared by O'Melveny and Myers (by Pierce Works, Esq., and John Whyte, Esq.) and by Donald S. Graham, Esq., its attorneys.

The complaint in action 8353 sought damages by Evans for the years 1939, 1940 and 1941. Defendant filed its motion to dismiss said complaint. Thereupon plaintiff in said action filed his amendment to his complaint pursuant to Rule 15-A of the Rules of Civil Procedure. Thereafter, by stipulation, said motion was heard as to the said complaint as amended and was granted by the court on the grounds of the statute of limitations as to the 1939 and 1940 crop years but was denied as to the 1941 crop year. The statute of limitations was suspended between Oct. 10, 1942 and June 30, 1946 by virtue of the amendment of 15 U.S.C. Sec. 16 passed Oct. 10, 1942 as amended June 30, 1945 (Acts of Congress, Oct. 10, 1942, Ch. 589, 56 Stat. 781; 59 Stat. 306; U.S.C.A. 1940 Ed. Supp. IV, p. 185; 15 U.S.C.A. 1949 Cumulative Annual Pocket Parts, Title 15, Sec. 16, p. 161.) The Evans suit was filed June 23, 1948.

The applicable statute of limitations was three years under Sec. 338, Subd. 1, Code of Civil Procedure of California, plus the period during which the statute was suspended as aforesaid, and the Evans suit was therefore barred as to any claims or cause of action arising prior to Oct. 3, 1941. The Evans cause of action for the 1939 and 1940 crop years arose prior to Oct. 3, 1941, and was therefore barred. The court, for that reason, on Nov. 22, 1948, granted defendant's motion to dismiss the Evans action as to the claims and causes of action in said Evans action No. 8353 for the years 1939 and 1940 and denied it as to the year 1941. The Evans action 8353 was tried as to the year 1941 only, but action 4643 was tried as to the years 1939, 1940 and 1941. Action 4643 was commenced on July 30, 1945. The statute of limitations in said action 4643 was suspended at that time pursuant to said statute as amended, and had been suspended continuously from Oct. [387] 10, 1942 up to said date and had run in said action 4643 less than the statutory period as to each of the years 1939, 1940 and 1941 which ended July 31, 1940, July 31, 1941 and July 31, 1942 respectively.

The amended complaint in action 4643, as amended, contained three counts, the first being upon the Sherman Act, and the second and third being for an accounting. Plaintiffs stipulated that if judgment were rendered in their favor upon the first count, that the second and third counts would be *functo officio* and would not be pressed. Action 4643 was tried only on the first count or cause of action thereof as amended. Evidence both oral and docu-

mentary and various stipulations were received in evidence, and the parties having presented written briefs to the court, and the matter being duly submitted to court, and the court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

The Court finds that:

(A) In these findings and in the conclusions of law, defendant American Crystal Sugar Company will be called "Crystal", plaintiff Mandeville Island Farms, Inc. will be called "Mandeville", plaintiff R. C. Zuckerman will be called "Zuckerman", plaintiff G. K. Evans will be called "Evans", Spreckels Sugar Company will be called "Spreckels", Holly Sugar Corporation will be called "Holly", and Union Sugar Company will be called "Union."

(B) A crop year as referred to herein and in the conclusions of law, is from August 1st of any particular year to July 31st of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences. The word "year" as hereinafter used refers to the crop year herein described.

(C) Certain stipulations of facts were entered into in writing [388] between the parties and received in evidence by and considered by the court. The court finds as true the facts stipulated to therein. The Court also finds as true the allegations of the amended complaint as amended in case 4643 and the complaint as amended in action 8353, admitted

by or not denied by the answer or amended answer thereto.

1. The grounds upon which the jurisdiction of the court depends are: this is an action brought by persons injured in their business and property by reason of acts of the defendant forbidden in the anti-trust laws of the United States (15 U.S.C.A. Sec. 15), and brought in a district in which the defendant is found and has an agent.

2. (a) Plaintiff Mandeville now is and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business in Stockton, San Joaquin County, California.

(b) Defendant Crystal now is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with its principal office and place of business and executive departments in Denver, Colorado, and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California. Its agent designated for service of process under and by virtue of the law of the State of California regarding foreign corporations is J. W. Rooney, of Oxnard, Ventura

County, in the above entitled district and division of California.

(c) Plaintiffs Zuckerman and Evans now are and at all [389] times herein mentioned have been citizens and inhabitants of the State of California and residents of San Joaquin County in said State.

3. (a) Plaintiffs Mandeville, Zuckerman and Evans assert rights herein to relief in respect of or arising out of a series of transactions in which common questions of law and common questions of fact arise and are involved. The said transactions involve agricultural contracts identical in practically all material matters and respects, for successive cropping seasons, each involving sugar beets to be grown in Contra Costa and San Joaquin Counties, California, north of the 36th parallel and in the delta of the San Joaquin River system.

(b) Mandeville Island at all times herein mentioned contained large areas of land suitable in composition, drainage, irrigation, location, climate and transportation facilities for the commercial raising of sugar beets suitable for processing into sugar. During the crop years 1939, 1940 and 1941 herein mentioned, plaintiffs Mandeville and Zuckerman had respectively supplies, equipment, tools, personnel, labor, organization, and knowledge adequate for the commercial raising on Mandeville Island of sugar beets suitable for processing into sugar.

4. The matter in controversy in each suit herein exceeds, exclusive of the interest, costs and attorney fees, the sum of \$3,000.00.

5. On Sept. 11, 1939, the Second World War

broke out and thereafter and up to Dec. 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defense against its possible entry into said conflict. On Dec. 7, 1941 the Japanese attacked the United States at Pearl Harbor. This was followed by declaration of war between the United States and all the members of the Axis. At all times herein mentioned from Sept. 11, 1939, the sugar beet industry was and now is one of [390] the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continued at the time of the filing of action 4643. The various steps involved in the production and sale of beet sugar in California during the years here involved, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, are as set forth in Exhibits A, B, C and D as hereinafter set forth in Par. 7-C.

6. (a) That portion of California north of the 36th parallel is hereinafter referred to as "Northern California." That portion of California south of the 36th parallel is hereinafter referred to as "Southern California." A relatively few beet growers in California had farms slightly north of the 36th parallel and these were considered by the beet sugar refiners as being in Southern California, despite the fact that their farms were geographically slightly north of

said parallel and they are herein considered as owning and operating farms and producing sugar beets in Southern California. During the crop years 1938 to 1942, both inclusive, large acreages of agricultural land in the United States, including portions of Northern California, Southern California, Utah, Colorado, Michigan, Idaho, Illinois and other states, were planted to sugar beets. Said sugar beets, when [391] harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and upon being harvested were delivered to these manufacturers and taken to the latter's beet sugar refineries where the sugar beets were manufactured by an elaborate process into sugar by said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured.

✓ (b) From 1937 to 1942 inclusive, there were only four manufacturers owning or operating factories that manufactured sugar beets into sugar in California, to wit, Spreckels, Holly, Crystal and Union, although a fifth company, Los Alamitos Sugar Company, (hereinafter called "Alamitos") signed contracts with growers in Southern California. It did not own or operate its own plant. All of Spreckels'

California factories were north of the 36th parallel; all of Union's factories in California were south of the 36th parallel; Holly and Crystal each had factories both north and south of said 36th parallel. The only practical market available to growers of sugar beets in Northern California during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a given crop year, even if the necessary material and equipment priorities could be secured. During all of said period [392] said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and the only practical market available to growers of sugar beets in Northern California, during said period, was sale to one of said manufacturers. A like monopoly was held by Crystal, Holly, Union and Alamitos in Southern California during the said period.]

(c) The sugar manufactured from said beets was, during all of said period, sold in interstate commerce throughout the United States. The beets, however,

including the beets purchased from plaintiffs during 1939, 1940 and 1941, all as hereinafter found, were planted, grown, harvested and processed into sugar wholly within the State of California.

(d) After sugar had or has been produced from sugar beets, it was impossible to distinguish the manufactured beet sugar manufactured from sugar beets grown in any one part of the United States from that manufactured from sugar beets grown in any other part of the United States, or beet sugar refined in one refinery from that refined in another refinery.

(e) During said period, the only sugar beet seeds commercially available in California were those securable from one of said manufacturers and the only method of sale of marketable sugar beets available to growers of sugar beets in California was by sale to one of the said manufacturers under standard form printed contracts prepared by the manufacturers, whereby the price to be paid by the manufacturers to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets.

7. (A) In and by said standard contract, the grower [393] agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to culti-

vate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturers. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacturer of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured sugar in interstate commerce.

(B) The contracts that were used in California during the years 1937 to 1942, were often called the "50-50" contracts. They were based upon a formula which was supposed to provide for the retention by the company of approximately one-half (50%) of the net return of the sale of the sugar produced from said beets and payment of approximately one-half (50%) of said net return to the grower, as the purchase price of the beets.

(C) Attached to the amended complaint in action 4643 as Exhibits A, B, C and D are true copies of Crystal's Northern California contracts for 1938,

1939, 1940 and 1941. Attached to the Amendment to Answer to First Amended Complaint, as amended, in action 4643 as Exhibits 1 to 19, are true copies of the contracts of Holly, Union, Alamitos and Crystal in force in [394] Southern California during the crop years 1939, 1940 and 1941 during the respective years and by the respective companies designated in said respective contracts.

8. Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured sugar in Northern California was determined under the various contracts by the net return from the sale of sugar manufactured in the beet sugar factory or factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. Exhibit "A" to the amended complaint in action 4643 is a copy of the standard Crystal Northern California contract for the crop year 1938. But during the crop years 1939, 1940, 1941 and pursuant to the conspiracy herein-after referred to, the standard printed contract as used by all of said manufacturers in Northern California, provided that the net return used as a basis for the prices to be paid the grower was the average net return of all refineries manufacturing beet sugar north of the 36th parallel in California and not the net return of the particular manufacturer or particular refiners with whom the grower contracted and to whom the beets were delivered and by whom

or which the beets were manufactured into sugar. During the years 1939, 1940 and 1941, all growers of sugar beets in California were paid upon an average net return basis. During said years growers in Southern California were paid on the average net return of the Southern California factories and growers in Northern California were paid on the average net return of Northern California factories. While contracts in different areas of California differed in the schedules used, they all had substantially the same terms and within a given area in California, all growers during 1939, 1940 and 1941 were paid during said years, the same price for beets of a given sugar content, regardless of [395] with which company the grower dealt or where their beets were manufactured into sugar.

9. Some time in 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, but which defendant did not disclose to the plaintiffs or to the court, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel, to monopolize and restrain trade and to unlawfully fix prices to be paid the growers of sugar beets, and, as a part of said conspiracy, said defendant and said two other manufacturers (Holly and Spreckels) agreed among themselves to do and did among other things during the crop years 1939, 1940 and 1941, the following:

(a) Each no longer competed against any of the

others as to the price to be paid the growers for sugar beets raised in Northern California;

(b) Each paid the same price to growers of sugar beets in Northern California, to-wit: the price determined upon the average net returns from the sale of all sugar sold in interstate commerce from the factories of said conspirators north of the 36th parallel in California during that crop year and did not pay the growers upon the net returns from the sale of sugar sold from the Northern California factory or factories of the particular manufacturer to whom the particular grower was under contract;

(c) Each no longer competed with the others, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organizations of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, or by any particular manufacturer, paid all growers of sugar beets in Northern California the same price [396] for the same amount of beets of the same sugar content. A similar method of paying growers on an average net return was used throughout Southern California during the same period;

(d) They did not pay the growers of sugar beets a reasonable price for their beets. Each of said conspirators sold seeds to, entered into contracts with and bought beets only from growers who signed a standard printed form of contract prepared by said manufacturers and practically identical in all material terms. Farmers contemplating or desirous of

growing sugar beets in Northern California either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a practical market to sell their marketable beets. A similar method was used during said years throughout Southern California;

(e) Said prices agreed upon by defendant and its conspirators to be paid by them and paid by them to plaintiffs and other sugar beet growers in Northern California during said period, are set forth in said Exhibits "B", "C" and "D" and were and are not the reasonable prices for sugar beets.

10. Prior to the 1939 crop season, the various manufacturers of sugar in Northern California, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease sales expenses and to operate as efficiently as possible in order to increase the unit return to growers of sugar beets under said standard contract and thus to attract beet growers to sign contracts with them. During the crop year of 1938, the net receipts of sales of sugar (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant per 100 pounds were greater than the average net receipts of the other manufacturers of beet sugar in Northern California. As a result thereof, during the crop year 1938, sugar beet growers in Northern California, north of the [397] 36th parallel, who had contracted with defendant, received on the average

from 28 cents to 50 cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of beets of identical sugar content delivered to the other manufacturers of beet sugar in Northern California.

11. During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer competition between the conspirators as had previously existed in their purchase of sugar beets.

12. As a direct, expected and planned result of said conspiracy, the free and natural flow in the purchase of sugar beets was intentionally hindered and obstructed. As a further direct, expected and planned result of said conspiracy, said three manufacturers operated, in so far as the growers' returns were concerned, as if they were one corporation owning and controlling all sugar beet factories in Northern California but with three completely separate overheads and selling expenses.

13. Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract. Defendant [398] Crystal has made payments for 1939, 1940 and 1941 beets to growers only in accordance with the method agreed upon by said conspirators as above set forth.

14. On December 2, 1940, Secretary of Agriculture of the United States, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations

duly made, did, pursuant to Section 301d of said Sugar Act (7 U.S.C. 1131 (d)), make the determination of the fair and reasonable price for the 1940 and 1941 crops of sugar as set forth in par. XIV of the amended complaint. Defendant took part in said hearings held by the Secretary of Agriculture, and knew of the determination, but persisted thereafter in said conspiracy and would not buy beets from growers in Northern California except under the terms and conditions set forth in said standard agreement.

15. On November 14, 1938, defendant and plaintiff Mandeville entered into one of defendant's standard form contracts for the 1939 crop season under which defendant promised to pay said plaintiff on August 31, 1940, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1939 delivered to defendant 22,355.6 tons of sugar beets of an average sugar content of 18.25 per cent from Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar.

16. On Dec. 29, 1939, defendant and plaintiff Mandeville entered into one of defendant's standard form contracts for the 1940 crop season under which defendant promised to pay said plaintiff on Aug. 31, 1941 for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1940 delivered to defendant 25,430.3 [399] tons of sugar beets

of an average sugar content of 15.55 per cent from said Mandeville Island, which beets were accepted by defendant and manufactured into sugar.

17. (A) On June 23, 1941 defendant and plaintiff Zuckerman entered into one of defendant's standard form contracts for the 1941 crop season under which defendant promised to pay plaintiff on Aug. 31, 1942 for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1941 delivered to defendant 14,144.7 tons of sugar beets of an average sugar content of 15.47 per cent from said Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant.

(B) Plaintiff Evans, and defendant, on Dec. 23, 1940, entered into defendant's standard form contract for the 1941 crop season. Attached to the Evans complaint in action 8353 as Exhibit "D" is a true and correct copy of said contract. Plaintiff Evans performed each and every term, condition and covenant on his part to be performed in said contract and delivered to defendant 4,401.7 tons of beets thereunder, yielding 17.53 per cent sugar, which beets were accepted by defendant and manufactured by it into sugar. Said contract covered Camps 5, 6 and 7 of American Island, Contra Costa County, California, which at all times herein mentioned were areas of land located in Northern California, suitable in composition, drainage, irrigation, location,

climate and transportation facilities for the commercial raising of sugar beets suitable for processing into sugar. At all times herein mentioned said plaintiff had supplies, equipment, tools, personnel, labor, organization and knowledge adequate for the commercial raising on said areas of sugar beets suitable for processing into raw sugar. [400]

18. (A) Defendant during the crop years 1939, 1940 and 1941, operated sugar factories in Clarksburg (Northern California), Oxnard, Ventura County (Southern California), in the Arkansas Valley in Colorado, and elsewhere in other states of the United States. Sales of all of such sugar were directed by the President of the company during said three-year period from the head office at Denver, Colorado. Holly also operated sugar factories in Northern California, Southern California and in the Arkansas Valley in Colorado. During said crop years, 1939 to 1941, pursuant to said agreements made between them, Holly and Crystal paid their growers upon a joint net return basis. In Northern California and in Southern California the joint net return included all of the manufacturers of sugar within said respective areas; but in the Arkansas Valley it included two of the three manufacturers there located (Holly and Crystal) and did not include the third factory there located, the one operated by National Sugar Manufacturing Company.

(B) Substantial quantities of beets produced by plaintiff as aforesaid and delivered to defendant in said years, were by defendant shipped to defendant's sugar factory in Southern California, located at Ox-

nard where said beets were manufactured into sugar by defendant. Said beets, when they reached the said Southern California factory of defendant at Oxnard, were mingled with beets raised by various Southern California growers and manufactured into sugar and it was, and at all times it has been impossible to differentiate the sugar manufactured from plaintiffs' beets from that manufactured from beets grown in Southern California.

(C) The reasonable prices for the sugar beets delivered by the plaintiffs to defendants for the years here involved were:

1. For the crop year 1939, [401] \$15,749.51 more than Mandeville received from Crystal.

2. For the crop year 1940, \$14,321.61 more than Mandeville received from Crystal.

3. For the crop year 1941, not less than \$3,528.00 more than Zuckerman received from Crystal; and \$1,100.00 more than Evans received from Crystal.

(D) Had it not been for said plan and conspiracy and if plaintiffs had received the reasonable value of their sugar beets in a market unfettered and unhampered by said combination, plan and conspiracy, Mandeville Island Farms, Inc. would have received \$30,071.12 more and plaintiff Roscoe C. Zuckerman would have received \$3,528.00 more and plaintiff Evans would have received \$1,100.00 more than each did receive under said contracts and each of said plaintiffs respectively sustained damages accordingly, none of which damages have been paid. These

amounts as found herein are on the conservative side.

19. By reason of the foregoing acts of the defendant and its said conspirators, the price of sugar beets was illegally fixed, and an illegal monopoly was established, to the damage of plaintiffs as aforesaid.

20. Plaintiffs, in order to enforce their rights against the defendant, employed the services of attorneys at law, and, under the anti-trust laws of the United States (15 U.S.C., Sec. 15), are entitled to reasonable attorney fees. The reasonable value [402] of the attorney fees performed up to the time of the judgment herein is \$25,000.00.

21. From Oct. 10, 1942 to June 30, 1945, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendments of 15 U.S.C. Sec. 16, passed on Oct. 10, 1942, and amendments thereto (Acts of Congress Oct. 10, 1942, Ch. 589; 56 Stat. 781, U.S.C. 1940 ed., Sup. IV. p. 185; U.S.C.A. 1844 Cum, An. P.P. Title 15, Sec. 16, p. 76), which was in full force and effect between Oct. 10, 1942 and June 30, 1945.

22. (a) With reference to action 4643, the amended complaint, and the first count of the amended complaint as amended by "Amendment to First Amended Complaint" and the first count of the amended complaint as amended by said amendment and as further amended by "Amendment to

First Amended Complaint", each state a claim upon which relief can be granted for the years 1939, 1940 and 1941.

(b) With reference to action 8353, the complaint and the complaint as amended by "Amendment to Complaint" and the complaint as so amended and as further amended by "Amendment to Complaint" filed Mar. 1, 1949, each state a claim upon which relief can be granted for the year 1941.

23. It is not true that any of the claims, causes of action and demands of Mandeville for 1939 and 1940, or Zuckerman or Evans for 1941, hereinabove set forth, are barred by the provisions of Subd. 1 of Sec. 337 of the Code of Civil Procedure of California, nor by the provisions of Sec. 343 of said code, nor by the provisions of Subd. 1 of Sec. 338 of said code, nor by the provisions of Subd. 4 of Sec. 338 of said code, nor by the provisions of Subd. 1 of Sec. 339 of said code, nor by the provisions of Subd. 1 of Sec. 340 of said code.

24. It is not true that the defense of *pari delicto* is [403] applicable to any of the plaintiffs herein. It is not true that any of the plaintiffs herein aided or abetted in the consummation of the combination and conspiracy hereinabove referred to or knowingly participated therein. None of the plaintiffs was a party of the said monopoly, combination or conspiracy. None of the plaintiffs was in *pari delicto* with the defendant or any of the other conspirators. Plaintiff accepted and signed the joint return contracts for 1939, 1940 and 1941 for the reason that otherwise they could not secure sugar beet seed or

sell their beets or engage in the business of growing sugar beets at a profit. Each of them entered into said contract because of a business necessity. None of them knowingly or wilfully helped to build up the said monopoly. The plaintiffs were members of a class for whose protection the said statute was enacted. Mandeville entered into a contract with Crystal in 1937 for the 1938 crop at a time when Crystal was not a party to any illegal agreement or monopoly in restraint of trade. Mandeville had purchased Mandeville Island from Empire Farms Co., which had previously sold beets to Crystal. Crystal owned a beet dump on Mandeville Island which is geographically an island and there was no other beet dump on Mandeville Island. As a result of a flood, Mandeville's 1938 crop was destroyed, leaving Mandeville indebted to Crystal in a large sum of money which was secured by a crop mortgage not only on that crop but also on crops thereafter grown until the debt was paid off. Mandeville continued to be indebted to Crystal from that time until 1944 and was indebted to Crystal at all times during the conspiracy. Evans had also dealt with Crystal prior to the conspiracy and was indebted to Crystal at all times during the conspiracy. Furthermore, Evans was a tenant of Crystal and could not have dealt with either of the other two refiners.

25. At no time have plaintiffs or any of them abandoned, waived, released, surrendered or given up in any way any of their claims or causes of action hereinabove set forth, nor have plaintiffs or any of them intended so to do. [404]

CONCLUSIONS OF LAW

From the findings of fact hereinabove set forth, the Court herein makes the following Conclusions of Law relative thereto:

1. All conclusions of law that are set forth in the findings of fact are incorporated by reference herein as though here set forth in full.

2. This Court has jurisdiction of the parties and of the subject matter.

3. Prior to the crop year 1939, defendant wrongfully and unlawfully entered into, and during the crop years 1939, 1940 and 1941 remained and operated under, a combination and conspiracy which was in restraint of trade and commerce among the several states and wrongfully and unlawfully conspired with other persons to monopolize part of the trade and commerce among the several states, in violation of and contrary to the Sherman Anti-Trust Act of the United States (26 Stat. 209, 38 Stat. 731, 15 U.S.C. Secs. 1, 2, 7, 15) and did and performed acts forbidden by said Act. Plaintiffs are persons injured in their businesses and property by said acts of defendant by reason of the defendants doing said things forbidden by said Act. These conclusions of law are in accordance with the law as held by the decision of the Supreme Court of the United States heretofore made in the *Mandeville* case No. 4643 (334 U. S. 219), which decision is binding upon this Court.

4. Plaintiffs were injured and damaged in their

businesses by reason of said matters forbidden in the anti-trust law in the following sums:

Mandeville, for the years 1939 and 1940—\$30,071.12.

Zuckerman for the year 1940—\$3,528.00.

Evans, for the year 1941—\$1,100.00.

5. Plaintiffs are entitled to recover three-fold the [405] said damages suffered by them, together with costs of suit and reasonable attorney fees.

6. Plaintiffs' said causes of action are not barred by any statute of limitations. The cause of action of Evans for 1939 and 1940 crop years was barred by the statute of limitations but are not included in the above damages.

7. Plaintiffs are not in *pari delicto* with the defendant.

8. Judgment should be entered herein in favor of plaintiff Mandeville Island Farms, Inc. against defendant American Crystal Sugar Company in the sum of \$90,213.36, together with costs of suit; in favor of plaintiff Roscoe C. Zuckerman in the sum of \$10,584.00, together with costs of suit; in favor of plaintiff G. K. Evans in the sum of \$3,300.00, together with costs of suit; and in favor of plaintiffs Mandeville Island Farms, Inc., Roscoe C. Zuckerman and G. K. Evans in the sum of \$25,000.00 at attorneys fees.

9. The second and third counts in the action 4643 should be dismissed without prejudice.

Dated: February 26, 1951.

/s/ BEN HARRISON,

United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed February 26, 1951. [406]

In the District Court of the United States
Southern District of California
Central Division

No. 4643—BH

MANDEVILLE ISLAND FARMS, INC., a corporation, and ROSCOE C. ZUCKERMAN,
Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Defendant.

No. 8353—BH

G. K. EVANS,

Plaintiff,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Defendant.

JUDGMENT

The above cases having been consolidated for trial upon stipulation of the parties and having been

regularly tried before the Honorable Benjamin Harrison, United States District Judge, a jury having been waived by all parties and the court [408] having heretofore filed Findings of Fact and Conclusions of Law and being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that plaintiff Mandeville Island Farms, Inc., a corporation, recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$90,213.36; that plaintiff Roscoe C. Zuckerman recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$10,584.00 and that plaintiff G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$3,300.00; that plaintiffs Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman and G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$25,000.00; that plaintiffs Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman recover judgment against defendant American Crystal Sugar Company, a corporation, for their costs herein in the sum of \$1,107.11; that plaintiff G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, for his costs herein amounting to \$35.00.

It Is Further Ordered, Adjudged and Decreed

that the second and third counts in action No. 4643-BH are dismissed without prejudice.

It Is So Ordered.

Dated: February 26, 1951.

/s/ BEN HARRISON,
United States District Judge.

Approved as to form:

O'MELVENY & MYERS,
DONALD S. GRAHAM,
PIERCE WORKS,
JOHN WHYTE,
Attorneys for Defendant.

Judgment entered Feb. 27, 1951.

Acknowledgment of Service attached.

[Endorsed]: Filed February 26, 1951. [409]

[Title of District Court and Causes—4643-8353.]

NOTICE OF MOTION TO AMEND
FINDINGS

To Plaintiffs in the Above-Entitled Consolidated
Actions and Their Counsel of Record:

Notice Is Hereby Given that defendant above named will, on March 19, 1951, at the hour of 10 o'clock a.m., or as soon thereafter as counsel may be heard, move the above-entitled Court [411] in the

courtroom of the Honorable Ben Harrison, Judge Presiding, for an order amending the findings of fact heretofore filed herein by striking from Finding 18D the following, appearing at page 17, lines 10-12 of the Findings of Fact and Conclusions of Law on file:

“if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said combination and conspiracy, and”.

Said motion will be made on the ground that the foregoing language is at variance with the theory upon which the case was decided by the Court, is contrary to the evidence, is irrelevant to the findings as to damage of which it constitutes a part, amounts to a finding, express or implied, upon an issue as to which the Court intended to make no finding, and, it is respectfully suggested, may have been made through inadvertence.

Dated: March 7, 1951.

DONALD S. GRAHAM,
O'MELVENY & MYERS,
/s/ By PIERCE WORKS,

Attorneys for Defendant.

Memorandum of Points and Authorities:

F.R.C.P. 52(b). [413]

[Endorsed]: Filed March 7, 1951. [413]

Acknowledgment of Service attached.

[Title of District Court and Causes—4643-8353.]

ORDER AMENDING FINDINGS OF FACT

Defendant above named having heretofore noticed its motion to amend Findings, and said motion having come on for hearing as noticed and having been heard, argued and submitted for decision, now, therefore, good cause appearing: [426]

It Is Ordered that said motion be, and the same hereby is granted, and the Findings of Fact heretofore filed herein be, and the same hereby are amended by striking from Finding 18D, the following appearing at page 17, lines 10-12 of the Findings of Fact and Conclusions of Law on file:

“if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said combination and conspiracy, and”;

and the Clerk is hereby ordered and directed physically to delete the said stricken matter from the said Findings of Fact and Conclusions of Law.

Dated: March 19, 1951.

/s/ BEN HARRISON,
Judge.

Approved as to form pursuant to Rule 7.

Dated: March 19, 1951.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS

/s/ By STANLEY M. ARNDT.

[Endorsed]: Filed March 19, 1951. [427]

[Title of District Court and Causes—4643-8353.]

NOTICE OF APPEAL

Notice Is Given that defendant above named, American Crystal Sugar Company, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the following portion of [428] that certain judgment heretofore and on or about February 27, 1951, entered in the above-entitled action, to wit:

“It Is Ordered, Adjudged and Decreed that plaintiff Mandeville Island Farms, Inc., a corporation, recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$90,213.36; that plaintiff Roscoe C. Zuckerman recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$10,584.00 and that plaintiff G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$3,-300.00; that plaintiffs Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman and G. K. Evans recover judgment against defendant American Crystal Sugar Company, a corporation, in the sum of \$25,000.00; that plaintiffs Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman recover judgment against defendant American Crystal Sugar Company, a corporation, for their costs herein in the sum of \$1,107.11; that plaintiff G. K. Evans recover judgment against de-

fendant American Crystal Sugar Company, a corporation, for his costs herein amounting to \$35.00.”

Dated: March 28, 1951.

DONALD S. GRAHAM,
O'MELVENY & MYERS,

/s/ By PIERCE WORKS,
Attorneys for defendant, American Crystal Sugar
Company.

Acknowledgment of Service attached.

[Endorsed]: Filed March 28, 1951. [429]

[Title of District Court and Causes—4643-8353.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Defendant and appellant American Crystal Sugar Company hereby designates for inclusion in the record on appeal herein the complete record and all the proceedings and evidence in the above-entitled consolidated actions, including the reporter's transcript of the evidence and proceedings therein already on [431] file; and further

Requests that the original papers be transmitted by the Clerk to the United States Court of Appeals for the Ninth Circuit, all as provided in Federal Rules of Civil Procedure 75(o) and in Rule 11(1) of said Court of Appeals; and further

Requests that said Clerk prepare and furnish for use upon the appeal, an index of said record and

papers as prepared for transmittal to said Court of Appeals.

Dated: April 5, 1951.

DONALD S. GRAHAM,
O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for said defendant
and appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed April 5, 1951. [432]

[Title of District Court and Causes—4643-8353.]

STIPULATION RE FILING AND DOCKET-
ING OF RECORD ON APPEAL—
(Rule 73(g).)

An appeal and cross appeal having been taken to specified portions of the judgment heretofore entered herein;

It Is Hereby Stipulated that the time for filing and docketing the record on appeal herein may be extended to and including May 26, 1951.

WOOD, CRUMP, ROGERS,
ARNDT & EVANS,
/s/ By STANLEY M. ARNDT,
Attorneys for plaintiffs and
appellants.

O'MELVENY & MYERS,
/s/ By PIERCE WORKS,
Attorneys for defendant and
appellee.

It Is So Ordered.

This 7th day of May, 1951.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed May 7, 1951. [440]

[Title of District Court and Causes—4643-8353.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of Califor-

nia, do hereby certify that the foregoing pages numbered from 1 to 440, inclusive, contain the original Complaint; Notice of Motion to Dismiss or in the Alternative to Strike From Complaint or For a More Definite Statement or for a Bill of Particulars; Stipulation and Order Filed November 26, 1945; Amended Complaint; Notice of Motion to Dismiss or in the Alternative to Strike from Amended Complaint; Order Granting Motion to Dismiss and Judgment of Dismissal; Amendment to Amended Complaint; Mandate of the United States Supreme Court; Answer; Amendment to First Amended Complaint; Amendment to Amendment to First Amended Complaint; Amendment to Answer to First Amended Complaint as Amended; Notice of Motion of Plaintiff to Strike Portions of Plaintiffs' Complaint as Amended; Coordination of Amended Complaint as Amended and Statement of Allegations of Amended Complaint as Amended that are Admitted by the Answer as Amended, all in case No. 4643-BH; Complaint; Notice of Motions to Dismiss and to Strike from Complaint; Amendment to Complaint; Memorandum; Answer; Amendment to Complaint; Amendment to Answer to Complaint as Amended; and Amendment to Answer, all in case No. 8353-BH; Pre-Trial Stipulation and Stipulation of Facts; Amendment to Answer as Amended; Additional Stipulation as to Facts; Stipulation as to Additional Facts; Stipulation as to Certain Facts; Memorandum Opinion; Defendant's Objections to Proposed Findings of Fact and Conclusions of Law Prepared by Plaintiffs; Objections to Second Draft of Plain-

tiffs' Proposed Findings of Fact, Conclusions of Law and Judgment; Objections to Third Draft of Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and Suggestions as to Amendments; Findings of Fact and Conclusions of Law; Judgment; Notice of Motion to Amend Findings; Affidavit of Stanley M. Arndt in Opposition to Motion of Defendant to Amend Findings; Order Amending Findings of Fact; Notice of Appeal; Designation of Contents of Record on Appeal; Notice of Cross-Appeal; Designation of Record by Cross-Appellants and Stipulation and Order re Filing and Docketing of Record on Appeal and a full, true and correct copy of minute orders entered July 12, 1948, January 9, 1950 and February 21, 1950 which, together with reporter's transcripts of proceedings on November 13, 1945, February 21, 23, and 24, 1950 and March 19, 1951 and original plaintiffs' exhibits 24 to 44, inclusive, and original defendant's exhibits A to K, inclusive, transmitted herewith, constitute the record on appeal and cross-appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$4.00 which sum has been paid one-half by the appellant and one-half by the cross-appellants.

Witness my hand and the seal of said District Court this 21st day of May, A.D. 1951.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,
Chief Deputy.

In the District Court of the United States for the
Southern District of California, Central Division

No. 4643-BH—Civil

Honorable Ben Harrison, Judge Presiding.

MANDEVILLE ISLAND FARMS, INC., a corpo-
ration, and ROSCOE C. ZUCKERMAN,
Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY,
a corporation,
Defendant.

Appearances:

For the Plaintiffs:

MESSRS. WOOD, CRUMP, ROGERS &
ARNDT,
By STANLEY ARNDT, Esquire.

For the Defendant:

O'MELVENY & MYERS, and PIERCE
WORKS, and JOHN WHYTE, Esquire,
By JOHN WHYTE, Esquire. [1*]

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, November 13, 1945, 10:00 a.m.

The Court: You may proceed.

The Clerk: 4643-BH, Civil, Mandeville Island

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

Farms and others versus American Crystal Sugar Company.

Motion of defendant to dismiss or in the alternative to strike from the complaint, or for a more definite statement or for a bill of particulars, pursuant to notice, motion, and points and authorities.

Mr. Arndt: The plaintiff is ready.

Mr. Whyte: The defendant is ready.

The Court: You may proceed.

Mr. Whyte: If the court please, this is a motion to dismiss, or in the alternative to strike from the complaint——

The Court: I have read the pleadings and have spent about two weeks studying this matter. I will not need a statement as to what is contained in your pleadings.

Mr. Whyte: I assume your Honor has read our points and authorities. I don't know how Mr. Arndt feels about it, but our position is set forth in our points and authorities and are just as I would present them to your Honor orally.

The Court: I would like a discussion with you gentlemen as to several points that I have in mind.

As I read the pleadings generally, they cover really two points. There are two points involved. One [2] concerns itself with the Anti-Trust Act and secondly there is an accounting question. And it seems that those two questions are split up into four causes of action.

One question I have in mind is whether your first cause of action, in using the language that you do, it might be subject to what in State practice would be called a general demurrer.

But regardless of that I think we should look at

this case from a practical point of view. What is best for the parties?

It is quite apparent to me from a reading of the pleadings that the question is whether a beet grower who enters into an agreement with a sugar refinery whereby the sugar refinery agrees to pay the current price for beets is a basis for the payment of beets by the other refineries in this particular area. The area is described as being north of the 36th parallel.

I want to say frankly, gentlemen, as I understand the claim of the plaintiffs that by reason of the growing of beets and agreeing to sell them to the refinery, brings the case within the purview of the Anti-Trust Act.

The pleadings here use some very broad language. They speak of the transportation of beets and sugar in interstate commerce.

I assume the evidence will show that beets were [3] sold to the sugar refinery and were processed and the sugar then entered into interstate commerce.

Mr. Arndt: I don't think we allege the beets themselves were in interstate commerce.

Mr. Whyte: Yes, you do. I assumed that was an oversight.

The Court: There is some language with reference to sugar and sugar beets in the complaint. I believe it is on page 7:

“* * * unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states * * *.”

Mr. Arndt: We do not allege, your Honor, that the beets themselves were physically transported. It

is our contention that under the decisions the entire situation was interstate commerce. We do not claim that there was a physical transportation of the beets over state lines.

The Court: I feel, however, that that allegation precludes the court from making a ruling.

I felt that if this complaint could be made clear in that respect and the contracts pleaded that a ruling would enable counsel to appeal the case without too much cost.

I want to say frankly that I feel this is not an interstate commerce case. I have spent some two weeks [4] studying it and I have a number of my own authorities. I have examined those authorities and I feel if this first cause of action could be ruled on with the contracts and the pleadings in proper shape, that it would be an inexpensive matter to appeal and determine whether or not I am wrong.

On the other hand, if the case should be tried it would be a very expensive matter.

You cited the *Apex Hosiery Company vs. Leader*, 310 U. S., page 502. I think you will find that page 512 contains much stronger language. But neither of you have cited the case of *Parker vs. Brown*, 317 U. S., page 341, which went up from this district. While it is not an anti-trust case it involved the question of whether or not raisins before entering into interstate commerce were to be classified as coming within the purview of the Interstate Commerce Act.

Of course that involved a state regulation. That case was tried by a three-judge court and a decision was had with Judge Yankwich dissenting and the Supreme Court agreed with Judge Yankwich in that case.

In reading these cases they almost create a state of confusion because where state regulations are concerned the courts are not inclined to assume jurisdiction but yet in anti-trust cases they are. There is one case that is probably not controlling but it is persuasive, and that is [5] an Alabama case in 127 Southern. I feel very strongly that as a trial court it is not my function to expand upon the meaning of interstate commerce. I think that is a problem for the appellate court and really the Supreme Court.

It seems there is no end of reading when you start examining these various cases, but I haven't found anything that makes me feel that an agricultural product enters into interstate commerce by reason of being delivered to a processor that is engaged in interstate commerce and who processes that particular agricultural commodity. I can understand the differentiation in wheat cases, where the wheat simply is purchased in interstate commerce and moves in its present form. It was, however, rather hard for me to understand the raisin case because raisins are delivered to the processor who finally enters them into the stream of interstate commerce. They don't change their form any. But here we have sugar beets that are completely changed. Only a very small percentage of the beet eventually enters into and becomes sugar. I believe in this particular case it is between 16 and 17 per cent.

Now, the contracts or portions of the contracts are pleaded in your motion to dismiss. You set them forth and indicate that I could use those contracts in passing upon this motion.

Mr. Whyte: I wasn't sure, your Honor. Those authorities [6] did give some indication of it.

The Court: But they weren't very convincing to me and I felt I should let counsel take their choice on that—that is, if you wanted to build up an expensive record in view of the court's attitude in the matter or wanted to get this thing in shape so it would be squarely before the reviewing court on the pleadings. In other words, I do not want to cause you unnecessary expense.

And there is another question that has occurred to me. Why aren't these growers co-conspirators also? They entered into a contract and the terms of the contract are clear. They agreed to all these things. Why aren't they co-conspirators?

Mr. Arndt: They knew nothing about the conspiracy, your Honor. We discovered it years afterward.

The Court: The contracts indicate a conspiracy to control the price of beets. It indicates that all the growers in that area received the same price for their beets.

Mr. Arndt: May I give your Honor this example? Suppose that all of the dealers in a given manufactured product—say all second-hand car dealers in California got together and they said or agreed not to pay more than X dollars for such and such a car and Y dollars for this car and Z dollars for that car; and they agreed that if they sell they would only sell them at certain prices. [7]

Mr. Jones wants to sell his car. He either has to sell it to one of these dealers or he can't sell it at all. Is he a co-conspirator? And are these beet growers that have no other place to sell except to one of these three people conspirators? They are helpless.

The Court: They are not helpless because they entered into this agreement before they planted their beets. In other words, they entered into an agreement whereby the seed was to be furnished and specified the terms of the sale. They recognized that north of the 36th parallel they were to receive the current market price. In substance what that means is the current market price that the other refineries in that area paid.

Now, they knew when they signed that agreement that they were going to receive the average price that the other refineries received. Now, why aren't they co-conspirators? That is just a question that occurred to me when reading that agreement. In reading the agreement it certainly makes the court feel that there was in fact an agreement between the sugar refineries of that area to pay a certain price for the beets. And it is also clear that the beet growers agreed to accept such a price. Now, why aren't they a part of it?

Mr. Arndt: I refer your Honor to the Bausch & Lomb Optical Company case, 321 U. S. 707. In that case, your [8] Honor, the Bausch & Lomb Company made the individual dealers in each state agree they would only sell under certain conditions and they either had to sell under those conditions or they couldn't get the lenses. Well, the individual dealers were not guilty of any conspiracy.

The Court: You have a different situation there. There is nothing here to indicate there wasn't free competition as far as the sale of this sugar was concerned. Any suppression of competition was suppression between the three refineries in the amount that they would pay the beet growers.

The beet growers depended upon their product, a root product, a bulb, and shipped them to the refinery, the refinery processed them and passed the finished product into the stream of interstate commerce.

Now, if the plaintiffs in this case were not a party to the agreement the sugar refineries could not have operated.

Mr. Arndt: Let me give you another example.

The Court: Just a moment. I have not followed that thought through nor attempted to. I just thought I would call counsel's attention to it because it was rather intriguing to me. I have thought about it over the weekend and it just occurred to me that they were all parties to it. There is only one refinery named as a defendant, when [9] as a matter of fact all three of them should have been joined as defendants.

Mr. Arndt: I have cases on that.

The Court: They were all co-conspirators and each liable if they had been named as defendants. You could have brought them all in just as easily as you could have brought one. I have brought up the question as to whether or not these beet growers are parties to the conspiracy to give you something to think about. I am just throwing that out to you as a thought and if it becomes necessary I will be glad to have you gentlemen spend your time briefing it. I have spent all the time I could on the question, and even before I left for the North and since returning, and to me it was a very interesting and intriguing proposition.

Mr. Arndt: May I be heard briefly on the two points your Honor raises?

The Court: Certainly.

Mr. Arndt: Let us take the grocery case. The exact argument was made there involving the wholesale grocers association operating in Southern California and Northern California. The exact argument was made as is here being presented by your Honor.

There they said the retail grocers only sold here locally—only sold in California; that the product they sold was sold by them at retail to the ultimate consumer. [10]

There was nothing sold in interstate commerce but the Circuit Court held you cannot separate, you cannot take an isolated portion of an industry. The particular groceries came to these grocery men through interstate commerce and because it came to them through interstate commerce the sale of the groceries to the ultimate consumer was in interstate commerce. They said you could not isolate one item and not consider the others.

I cannot see how you can possibly reconcile that decision with the thoughts that your Honor has given us here, because the difference between the raisin growers case and this is a very simple one.

Here the contract provides that the sale is not consummated until the product is sold, the raw sugar is sold, and the raw sugar is sold in interstate commerce. Therefore, the activities in interstate commerce are a part of the very contract itself. Until the sale is made in interstate commerce we don't know what the grower is going to get, so to say we can separate—we can throw out of the contract the portion that provides for the price, is to take a part

of the contract away that is an essential part of the contract.

We have alleged in our complaint that prior to 1939 the method of sale—how it was done. And we have alleged that they joined together to change this method of [11] sale.

Now, the various other cases that we have cited from the United States Supreme Court are all recent cases, and they all say that you cannot take one part of a transaction and separate it and say that because one act was done in interstate commerce—we have cited case after case, your Honor, in which that very argument was made as is being made here, that you could isolate one part of it and say that is not interstate commerce, because in each one of these cases you could isolate some transaction.

The court there said it couldn't be done and here is the vice of what has happened here. Prior to 1940—prior to 1939 the three companies competed in interstate commerce as to their sales organization. Each tried to make the most efficient sales, each tried to produce most efficiently for interstate commerce, but after the conspiracy and as a part thereof they ceased to compete with each other. They were not interested any more in competing as to the efficiency of their sales organization or anything else because they had this plan and conspiracy.

Interstate commerce was much more directly affected in this case than it was in the wholesale grocers case. In the wholesale grocers case there was only an indirect connection. Here there is a contractual connection with interstate commerce as provided by the very contract [12] itself.

Now, as to the second point your Honor raised. I

don't see how that is practical because we have a second count here which does state a cause of action.

The Court: I have been talking about the big issue in this case.

Mr. Arndt: But how can there be an appeal until the second count is determined? There can't be an appeal from an order on one count only.

The Court: I think it was Justice McKenna who said in effect:

“To carry your argument to its natural conclusion the Anti-Trust Act would cover everything.”

Mr. Arndt: And that is what the Supreme Court has done.

The Court: It hasn't, as I view it, in light of the opinion in *Parker vs. Brown*.

While that was not an anti-trust case, it held that it hadn't entered into the stream of interstate commerce and therefore the state had jurisdiction.

I think it was Justice McKenna who said:

“There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and [13] that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected, and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such

products are not yet exports; nor are they in process of exportation; nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of there being intended for exportation, but taxed, without any discrimination, in the usual way and manner in which such property is taxed in the state.”

Mr. Arndt: That is correct, your Honor, but here we have a contract that provides that the purchase price is [14] determined by sales in interstate commerce.

The Court: But not of that sugar. It is of that season's sugar, as I understand it. I don't know anything about the sugar business and perhaps I will have an opportunity to learn something along those lines before we are through with this case. But as I understand it, they pay them not for the sugar received from those particular beets or the sale of that sugar, but rather from the current price of sugar.

Mr. Arndt: That is not exactly correct, your Honor.

Mr. Whyte: That is one of the points at issue under the contract as I understand your contention.

Mr. Arndt: The contracts prior to 1939 provided

that the price to be paid was the price to be paid for sugar manufactured by the particular processor.

Mr. Whyte: That isn't the way I read this contract.

Mr. Arndt: That is how it was prior to 1939. Then since 1939 it was the sugar manufactured in California, north of the 36th parallel—not the proceeds from any other sugar, but the proceeds from the sugar manufactured during that particular year. I want to read from the document——

Mr. Whyte: Sugar grown north of the 36th parallel and sold during the year?

Mr. Arndt: I will read from the first one—that is [15] the first one here:

“The price per ton shall be determined upon the average net returns received for sugar manufactured at beet sugar factories located in California north of the 36th parallel.”

That is 1939. That is the first one.

Mr. Whyte: Exhibit A, your Honor.

The Court: What paragraph are you reading from?

Mr. Arndt: 5.

The Court: “The price per ton for beets delivered hereunder to the company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of 12 months commencing August 1, 1939, and based upon the company's test of sugar content

of the individual grower's beets in accordance with the following schedule:"

Mr. Arndt: Yes, but the point I am making is that sugar manufactured in beet sugar factories located in California north of that parallel during the year.

The Court: Let me ask this question as a matter of general information. These beets are processed in the refineries and following that is the sugar immediately put [16] on the market?

Mr. Whyte: There is some lag, I suppose, according to supply and demand.

Mr. Arndt: In some years it is immediately sold and some years there is a carry-over. Right now there is a shortage and it is sold immediately.

In 1939, '40 and '41 there was an overproduction and it was not immediately sold. It is as counsel says, a question of supply and demand whether sold immediately or not sold immediately. As a matter of fact, I think the cause of our present lack of supply of sugar is due to these contracts.

Mr. Whyte: I don't suppose I have to answer such a remark as that.

The Court: Another case that I was interested in is 260 U. S. 245. I don't know whether this case was cited by either counsel. There is certain language in the case that I would like to read:

"We may, therefore, disregard the adventurous considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the products of a State that have, or are destined to have, a market in

other states, are subjects of interstate commerce, though they have no moved from the place of their production or [17] preparation.

“The reach and consequences of the contention repel its acceptance. If the possibility, or, indeed, certainty of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet ‘on the hoof,’ wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to states other than those of their production.”

Mr. Whyte: And in our case you might say “seed as yet [18] unplanted”.

Mr. Arndt: But how can that be reconciled with the recent decision?

The Court: Gentlemen, if you can reconcile the decisions on this question you are more fortunate than I am. All I can do is follow what I consider to be the trend of these decisions. But I do not feel that it is my function to extend the rules as I now understand them. I feel that if they are to be expanded that is the function of the courts that have the final interpretation of these sections. I do not feel it is my function to legislate.

Mr. Whyte: Your Honor, under any theory there must be some allegation of facts and this complaint is absolutely barren of any allegation of fact——

The Court: You are not going to argue against me, are you?

Mr. Whyte: No, sir; I am trying to supplement your Honor's remarks to satisfy counsel here.

Mr. Arndt: May I read from some of these decisions again?

The Court: Well, I have read your cases, counsel, and I have probably given more time to this case, particularly on a motion to dismiss, than I have on any other case for a long time.

In the first place it was a new subject to me and [19] it was interesting. There is such a thing as convincing myself to the contrary, but at this time I am convinced that these beet growers are not entitled to protection under the Anti-Trust Act. I may be wrong. It won't be the first time I have been wrong, and it will probably not be the last time either. But I do feel that the pleadings without pleading the contracts and with this particular language in there, makes it difficult to dismiss in view of the

general language used and the liberality of pleadings under the Federal Rules of Civil Procedure.

Mr. Whyte. Doesn't your Honor have discretion to grant the motion with leave to amend?

The Court: I have had this rather frank, informal discussion with counsel to let them know what I have been thinking. I don't know how you gentlemen could approach the subject other than for me to sit here and listen. I was in hopes that counsel would see fit to amend the first cause of action so that we could get a definite ruling because if we try it and then I should rule as I do now you would be unable to prove that the beets went into interstate commerce and after going through all those preliminary steps and building up a record I don't know whether you would be any better off or not.

Mr. Arndt: Then how is it procedurally possible? Suppose I do amend and set forth the contracts? How is it [20] procedurally possible to have an appeal without a trial? I am not going to abandon my second count.

The Court: I am not asking you to abandon anything. I want you to understand I am only trying to be helpful. I want to try to decide this case correctly. At the same time I feel that if these matters could be reached and have a ruling on this question that it would save you both money because if the court rules with you on this first cause of action then the law of the case is going to be established and it would be settled. On the other hand, if we try it and build up a record and the court reverses it and sends it back for re-trial, you would have to go through the same

thing again. Now, we might do like we did in one other case we had. We might enter into—I don't know whether any statute of limitation is involved here.

Mr. Arndt: There is, your Honor. The statute will have passed ——

The Court: Has it run yet?

Mr. Whyte: That would be four years under Section 343.

Mr. Arndt: The statute has run on the first year. The statute has run on one of the years. In other words, the statute ran August 31st, that is my recollection, as to one count.

The Court: We had a case where that situation arose. Counsel had several causes of action and under a stipulation [21] and by agreement they dismissed their other causes of action and each party waived the statute of limitation and consented that a new suit be filed at any time within six months after a final determination of the case in the Circuit Court.

Oliver Clark and Lyons & Lyons entered into that agreement by stipulation whereby they could divide their cause of action by a stipulation and have a separate cause of action on the other points and try that.

Mr. Whyte: Counsel will be willing to stipulate to the status quo as to the date of the file as to any re-filing. I don't know what the date is.

Mr. Arndt: You didn't plead the statute of limitation in the second and third counts, so I assume you don't contend it was limited at that time.

Mr. Whyte: That is right. When was this action filed?

The Court: July 30th.

Mr. Whyte: We would be willing to so stipulate.

Mr. Arndt: There would have to be a contract authorized by a Board of Directors of the corporation. I don't think attorneys have a right to —

The Court: If we continue the matter for a week and you gentlemen discuss it you might arrive at some agreement.

Mr. Whyte: We are glad to do that. You [22] might file two lawsuits if you want to and we will protect you on the statute.

The Court: One has already run in the meantime.

Mr. Whyte: I say we will protect him on the statute back to the date when he filed.

The Court: It seems to me there should be a practical way to determine it because the real money involved is in the treble damage action. The rest of it involves an interpretation of the contract. The real thing involves money and that is under Count 1. It is that count that will make the growers feel good if they recover and the refiners feel bad if it goes in that direction.

Mr. Whyte: A lot of money is involved in that count.

The Court: I realize this is not an open and shut proposition. I realize it is a close case. It may be that the court will hold that I am wrong but I don't see why we should spend weeks in trying the case when the court feels it doesn't state a cause of action.

Mr. Arndt: There are certain advantages in what Your Honor says and I will endeavor to work out

something along that line. I appreciate Your Honor's suggestion.

The Court: If it simply goes up on the pleadings it would be a very inexpensive appeal. If it goes up on a record of days and days of transcript it would be very expensive. [23]

Mr. Whyte: We would be happy to work out something along the line of Your Honor's suggestion.

The Court: I would be interested in any authorities you gentlemen might have on the thoughts I have expressed.

Mr. Whyte: Your Honor may rest assured we will explore that subject further.

Mr. Arndt: I would be very much interested in hearing certain judges of the United States discuss the question of the farmer being a conspirator with a sugar company.

The Court: If this were a criminal case, gentlemen, and they were named as defendants they would be held liable as conspirators. It is true the farmer is a little fellow in the picture, but in this case, considering the amount of beets that they sold, they weren't so small. The sales ran into a lot of money and it wasn't a matter of an individual growing beets on a half acre of ground. He was in the business in a big way and your evidence of conspiracy is going to be this contract itself—at least part of it as to establishing a conspiracy, and all the parties that entered into that contract have the appearance to me of being co-conspirators.

Now, it may be that I have gotten (having tried

so many conspiracy cases) an obsession on the subject, but they seem to bring everything in but the kitchen sink when they try a conspiracy case. I don't know how a man who [24] sells \$100,000 worth of beets in one year can say that he was blameless, particularly when he entered into an agreement before the crop was planted. If they had forced him into some agreement before he had his beets growing and forced him to take their own price that would be different.

Mr. Arndt: I can allege that for one year that happened—those are the facts. For one of the years the beet contracts were signed after the beets were planted.

The Court: I want to say that the thing that bothered me most on this question, was the wording of the contract and it represents to me the closest point—the contract providing for the payment out of the sale of sugar, that represents a very, very close question and for a while I felt that the interstate commerce started with the beets and that it was a continuous movement by reason of that contract. However, I have come to a different conclusion.

Mr. Arndt: Without that there would be no case.

The Court: Well, there might have been an oral contract and they might have been paid on that basis.

Mr. Arndt: When I use the word "contract" I mean either oral or written. I mean without that being in the contract. That is what differentiates it from the other cases.

The Court: That is the thing that bothered me for so long before I finally came to a different con-

clusion. There are two or three cases here that are about as near on all [25] fours as you can get them.

Mr. Arndt: On both sides.

The Court: Yes, on both sides. And that is what makes a lawsuit. If it was all one-sided you wouldn't be here. There is enough involved to try it out.

I will continue this matter until next Monday, November 19, at ten o'clock, or any other date that is agreeable.

Mr. Arndt: May we fix it for eleven o'clock that day? I have a matter in the Superior Court at 9:30 which I would like to complete, and if we could meet here at eleven o'clock I would appreciate it.

The Court: Very well, I will take it up at eleven o'clock.

Mr. Arndt: And there will not be any argument at that time.

The Court: I will take it up at eleven o'clock. I have taken longer this morning with my calendar than I am accustomed to, but I wanted to discuss this case with you gentlemen after reading your briefs. I think you can see that I have been interested in the case.

Mr. Whyte: We certainly appreciate Your Honor's interest in it.

The Court: I don't know whether that can be said by counsel on the other side. [26]

Mr. Arndt: I think I made that statement a few moments ago.

Mr. Whyte: Thank you very much, Your Honor.

The Court: Very well, we will stand in recess until two o'clock.

Whereupon, at 12:00 o'clock noon, the above entitled matter was concluded.)

[Endorsed]: Filed Sept. 13, 1948.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California,
Tuesday, February 21, 1950, 10:00 a.m.

The Court: You may proceed.

The Clerk: No. 4643-Civil, Mandeville Island Farms, Inc., a corporation and Roscoe C. Zucker-
man, plaintiffs, versus American Crystal Sugar Com-
pany, a corporation, and No. 8353-Civil, G. K. Evans,
plaintiff, versus American Crystal Sugar Company,
a corporation, consolidated for trial.

Mr. Arndt: The plaintiff is ready.

Mr. Works: Ready, Your Honor.

The Court: The clerk just called my attention to
the fact that he doesn't believe the record shows
these two cases have been formally consolidated.

Mr. Arndt: That is correct; and at this time I
move for such consolidation.

Mr. Works: We join in the motion to consolidate
for the purpose of the trial.

The Court: It will be so ordered.

Mr. Works: May I take up one or two prelimi-
nary matters, Your Honor?

The Court: Yes.

Mr. Works: At the last hearing Your Honor gave
us permission to amend the answer in each case to
plead the defense of *pari delicto*.

At that time the choice was given whether to do it that [4] way or to amend to conform with the proof. Mr. Arndt wanted us to complete it so I have served these two amendments and may I now have leave to file them?

The Court: They may be filed.

Mr. Works: In looking over the files I notice there is an ambiguity in the pre-trial stipulation of facts which Mr. Arndt and I have agreed may be corrected. On page 9, Your Honor, paragraphs 30 and 31, Your Honor will note that there is a table in each of those paragraphs. One of them, paragraph 30, relates to the joint net returns and that is expressed in cents. Paragraph 31 refers to single net and that is expressed in dollars.

The point is that one is expressed in terms of a pound of sugar and the other in terms of 100 pounds and we would like to amend each of those paragraphs to make it clear that it refers to pounds of sugar and the expression should each be in cents.

The Court: Why don't you simply add "per pounds of sugar sold"?

Mr. Works: That is what I had in mind, Your Honor.

The Court: And the other is per hundredweight, is it?

Mr. Works: Well, I thought we might do this, say per pound in the other also and change the dollar mark to a cents sign because it amounts to the same thing.

The Court: I think you gentlemen can by [5] interlineation correct the original.

Mr. Works: If you will give us that permission we will do it during the recess.

The Court: Yes. The fact that paragraph 30 refers to the pound and the other per hundredweight is rather apparent.

Mr. Works: That is right. We wanted to be perfectly clear on that.

The Court: I don't know where you gentlemen are going to start in this case. I have been thinking about it. Your briefs filed over the week-end were filed while I was holding court in San Diego and I haven't had time to study them. However, I have lived with this case for so long and so many facts have come up and so many arguments have taken place that I now find myself more or less in a state of confusion and you gentlemen are going to have to clarify the atmosphere by a statement of the facts that you want to go into this morning so far as the evidence that you wish to introduce.

Mr. Arndt: If the court please, it is my thought to proceed as follows:

I have heretofore filed a document entitled "Coordination of Amended Complaints as Amended" which combines into one document the complaint and all the amendments and everything that has been stricken out.

That was filed prior to pre-trial and there has been no objection made as to that so I assume it is correct so far [6] as counsel is concerned.

Mr. Works: There are some inaccuracies, Mr. Arndt. I have in mind one in particular which relates

to our answer to paragraph 10 of your amended complaint with reference to our 1938 net.

That allegation was denied by an amendment to our answer and I notice your coordination shows it as admitted. If you will look at paragraph 10——

Mr. Arndt: I think we are referring to two different things. The coordination of amended complaints has nothing to do with the answer. That is the second amendment, the statement of allegations of the complaint that are admitted.

Mr. Works: Wherever you have it that allegation is denied.

Mr. Arndt: I haven't reached that stage yet.

Mr. Works: All right.

Mr. Arndt: The next document which I think is the one to which counsel refers, is a statement of allegations of amended complaint as amended that are admitted by the answer as amended.

I think that is the one that counsel has reference to.

Mr. Works: That one certainly is and I wasn't sure whether the matter was gone into in your other document or not.

Mr. Arndt: No. The first document merely sets forth [7] the complaints with the amendments and has nothing to do with the answer whatsoever.

Mr. Works: All right.

The Court: It is a compilation of the last five years' work, is that it?

Mr. Arndt: Instead of having to go through a half a dozen documents I have it all in one document. That was the sole purpose of that, your Honor.

The Court: That is what I assumed.

Mr. Arndt: The second is a statement of the allegations of the complaint as amended and admitted by the answer as amended.

This is the first time I am told it wasn't correct. Which particular paragraph are you referring to, counsel?

Mr. Works: Paragraph 10 which has reference to the 1938 net. We saw no occasion to question it at the time because it was not a document called for in the pre-trial order at all.

Mr. Arndt: That puts me in the position that I, not having received any objection to that, I have proceeded under the assumption that that particular matter was admitted and I have not produced here nor taken the deposition of the other companies to show their 1938 returns and those are the figures that are shown.

Mr. Works: Mr. Arndt, we have on file an answer denying [8] that allegation. That is all I can say. It has been there for months.

The Court: Gentlemen, let me say this. If either one of you finds yourself in difficulty because of a confusion in the pleadings in this case the court will give you an opportunity to develop any fact that should be before the court. For instance, under your stipulation of facts if you find you have made an error or there is an omission that is against interest and that you say you have made, the court will permit you to develop it. After all, the court only wants the facts. It has taken five or six years now and if it takes another five or six years it doesn't bother me.

Mr. Works: That is perfectly all right. I merely wanted to make the record clear.

Mr. Arndt: There has been presented one document entitled Stipulation of Facts which we hope to have for your Honor by this afternoon and a second document entitled Stipulation of Facts which stipulates as to certain additional facts not included in this stipulation owing to the fact that some of the records are in Denver and some in Clarksburg. We have been delayed in getting all of the data necessary for that particular stipulation but we hope to have it this afternoon.

Mr. Whyte: Yes.

The Court: Gentlemen, you have indicated here different interrogatories that are going to be [9] introduced.

Mr. Arndt: Yes, your Honor.

The Court: Only certain parts are to be introduced in evidence and I am wondering just what kind of record we are going to have when we get through if one of you desires to appeal this case.

Mr. Arndt: I intend to read each one of them in unless your Honor has some other suggestion. That is what I intended to do. I thought that would take up all morning.

The Court: That is satisfactory to me. I am a good listener.

Mr. Arndt: I would first offer the stipulation of facts, which is the one that is dated January 4, 1950, and which accompanied the pre-trial stipulation.

Mr. Works: We have reserved objections in the pre-trial stipulation to a number of the paragraphs.

In other words, we have stipulated to the facts, your Honor, but we have denied their materiality or relevancy in a number of instances.

I don't know how your Honor cares to proceed in a situation of this sort.

The Court: If you can tell me how I can proceed or how to proceed so as to keep the record clear I would be glad to have your aid.

I want to say frankly, on the different theories and the admissibility of evidence, I think the better way is to reserve your objections until the evidence is all in and I have had [10] an opportunity to study the record. Unless that is done I can't rule very intelligently.

Mr. Works: That is what I had in mind.

The Court: As a matter of fact when the Supreme Court gets through with the case, notwithstanding your opinion to the contrary, it isn't such a complicated picture as you may think. I think the difficulty in this case is going to be the establishing of damages. The Supreme Court has held such agreements constituted a violation of the Antitrust Act and your agreements were entered into and I think your stipulation shows that the entire state of California was covered between the different companies. [11]

The question then comes up, is the grower damaged.

I haven't read all of Mr. Arndt's statement that he filed the other day. He has a theory on the question of damages, and I don't know whether his theory is right, whether his attempt to establish damages is by a reasonable method. I don't know.

I am inclined to think, if there is any damage, the thing is to put in all the facts, and then we could let a jury figure it out of thin air and hope to have some basis for it. A jury doesn't have to have much basis, if they can show damages. In other words, it seems to me that is the real difficulty in this case, is to show there is any actual damage. There could be a conspiracy that could be to the advantage of these companies that wouldn't be to the disadvantage of the growers.

Mr. Works: It is a profit-sharing scheme, as far as that goes.

The Court: Whether or not there is any damage seems to me to be the really serious problem in this case. I think the rest of the maneuvers are more or less dressing up the lawsuit.

Of course, I realize that you don't agree with that entirely, but I felt as you did in the beginning of the case, that the Antitrust Act didn't cover it. The Supreme Court said I was wrong and you were wrong in your theory. That is [12] as far as the cause of action.

Mr. Works: Yes, they certainly held that. There is no question about it.

The Court: So that, really, if you want to get down to the gist of this, it is to determine whether or not the plaintiffs in this case have been damaged. Now, if they can't establish any damages, then they are going to have to refer back to their accounting in the case, and I think there are certain features of this case that have to be taken into consideration in fixing and indicating a violation of the Antitrust Act

that really come under the accounting. I think some of these by-products that were available to one plant and were not available to the Oxnard plant, and they haven't received credit for it that they claim, that all comes under the accounting angle of it, as I view it.

But the most serious angle of this case is determining the damages, if any, and the most serious part is the trebling of the damages.

Mr. Works: That is what you might call the painful part. your Honor, I wonder if it would help if I were to state our position.

The Court: I would like to have that.

Mr. Works: I have here a copy of the Supreme Court's decision, and there are certain parts of it to which I would like to refer. [13]

First, as to the effect of that decision, as we all know, that case went up on a motion to dismiss, and for the purpose of that motion all of the facts alleged in the complaint had to be taken as true. At that time no answer had been filed. Since then an answer has been filed, and it has put in issue practically all of the material allegations of the complaint as amended.

As your Honor observed a moment ago, what the court held was that that complaint stated a cause of action, and it held it upon the basis of the facts alleged in that complaint, because each and every one and all of them had to be taken as true for the purpose of that motion. That is shown very clearly—

The Court: I realize that. As I view the decision, it in effect held anything that had to do with sugar

was interstate commerce. That is the ultimate effect of it. In other words, it is like oil. You might be drilling an oil well and hit a dry hole, and yet the contractor that is drilling for oil and hits a dry hole comes under interstate commerce, because it affects interstate commerce. It is about the same thing here. That makes it come within the purview of interstate commerce, because it is an extension of it.

Mr. Works: They so held because that is what the complaint alleged in terms, that there had been a restraint upon interstate commerce, and Mr. Justice Rutledge at page 246 of [14] the opinion said the only interstate product was sugar and therefore they had alleged a restraint upon the sugar. They had to take that fact as true, because it was alleged, and for the purpose of the motion it had to be taken as true.

The Court: You may refresh my mind, counsel, but I thought the complaint as amended and finally passed on deleted the sugar and dealt with the sugar beets.

Mr. Works: So did we, and that whole question was argued in Washington, and Mr. Justice Rutledge, with all respect, wrote his way around that situation. That was one thing that Mr. Justice Jackson did point out. Let me read a portion of that to you, if I may, your Honor.

The Court: Of course, I have read a good many other cases since then, so I can always have my mind refreshed.

Mr. Works: Your Honor will recall that there was a situation whereby you indicated you felt this question should be tested.

The Court: I felt that when they used the word "sugar," that would apply.

Mr. Works: Exactly.

The Court: And I felt that if it dealt with beets that had not been processed into sugar, that was a different matter, and they amended the complaint so as to make an inexpensive method of determining the issue of whether that complaint was good. [15]

Mr. Works: And that question, your Honor, was never decided on this appeal, and I will show you why, if I may refer to the opinion. Reading from page 244, if I may:

"Respondent"—that is ourselves—"has presented its argument as if the amended complaint omitted all reference to restraint or effects upon interstate trade in sugar and confined these allegations to the trade in beets. It is true that at the hearing which followed filing of the amended complaint, petitioners at one point, apparently in response to some intimation from the court, eliminated the words 'sugar and sugar beets' from one of the allegations that the refiners had conspired to 'monopolize and restrain trade and commerce among the several states. . . .'

"Respondent takes this elision"—this elimination of the words sugar and sugar beets—"as effective to constitute an express disavowal by petitioners of any charge of restraint of trade in sugar, the only interstate commodity. The amendment did not eliminate or affect numerous other allegations which in effect repeated the charge in various forms and

with reference to various specific effects upon interstate as well as local phases of the commerce. Some of these explicitly specify trade or commerce in sugar, others designated the trade affected as interstate, which on the facts could mean only sugar. Moreover, petitioners deny the disavowal, both in intent and in effect. They say the elision [16] was insubstantial, since in the clause from which it was made the allegation of conspiracy to monopolize and restrain interstate commerce remained, and the only interstate trade was in sugar."

Your Honor gave us a quick appeal on that question, and the question never was decided for the reasons stated here.

"We think the amendment, for whatever reason made, was not effective to constitute a disavowal, disclaimer, or waiver." [16a]

Now, Mr. Justice Jackson got the point and so did Mr. Justice Frankfurter. I know a dissenting opinion is only a dissenting opinion, but they laid out the situation exactly as we thought it was when your Honor made the suggestion with respect to testing the question as to whether a restraint on beets alone would be a violation of the Sherman Act.

The Court: Of course, I wouldn't have granted the motion to dismiss if I had considered it as including sugar.

Mr. Works: Exactly. We knew that.

The Court: And, as a matter of fact, I told you gentlemen so.

Mr. Works: We knew that.

The Court: I figured that the effect of the decision was to hold, like in the milk cases, they were simply bringing the industry within the purview of the Antitrust Act.

Mr. Works: At any rate, the case was decided by the Supreme Court upon the basis of a charge that interstate commerce in sugar was restrained. That is what it holds. Or, rather, that the complaint stated a cause of action.

May I continue merely stating our contention?

The Court: Yes.

Mr. Works: The court does indicate that it is necessary to make out a cause of action under the Sherman Act: First, that you must show a combination; second, and this is important here, and this is the place where I think we should make [17] our position very clear, you must show that that combination had a substantial effect on interstate commerce, because the Supreme Court indicated that is still the law; and the third, of course, is that you must show damage resulting from such a combination to a reasonably certain extent.

The Court: Let me ask you this. You said the first was that there was a conspiracy in restraint of trade.

Mr. Works: There must be a conspiracy or combination first; two, it must have a substantial effect upon interstate commerce, and, three, it must cause damage to the parties in a reasonable certain extent.

The Court: Take the first one.

Mr. Works: I am going to be frank about that, your Honor. I think we cannot dispute the proposition that your Honor right now has a right to infer

from these cropping contracts that there had been a combination or an agreement between the three manufacturers to use a joint or common or multiple price determination factor in arriving at the price of sugar beets. I can't be any less frank than that. But there still remains to be proven two things, granted such a combination, as we all know the beets never get out of the state.

Question No. 2 is, did that combination—I am not going to use the opprobrious term of conspiracy, inasmuch as I am very frankly telling your Honor what I think you can infer [18] from the contracts themselves—did such a combination or such an agreement with reference to the sugar produce a substantial economic effect upon interstate commerce? That question still remains to be proven by the plaintiffs in this case.

The Court: Now, why don't you be just as frank in that respect, counsel?

Mr. Works: I would be happy to.

The Court: That under your theory, if I happen to have five acres of beets, then I would never have any remedy, because I couldn't prove that that had a substantial effect. You could make any kind of a conspiracy to prevent me from getting a fair price for my beets, and yet that wouldn't have any substantial effect. The amounts involved here are substantial.

Mr. Works: Certainly, your Honor, they are.

The Court: So that is the reason I think it resolves itself down to a question of whether or not, if there hadn't been any of this arrangement, whatever you call it—you don't want to call it con-

spiracy, you don't want to be charged with being a conspirator—but whether or not this arrangement resulted in the growers getting a less price for the beets than they otherwise would have gotten.

Mr. Works: We haven't got to that yet. Your Honor says "substantial." It is substantial dollar-wise, according to [19] claims of the plaintiff, but we don't think it is. However, the substantial thing must be the effect upon interstate commerce. Whether you have five acres or whether you have 100,000 acres, whether you are running a little farm or whether you are running the King Ranch down in Texas, you are not within the purview of the Sherman Act unless what you do in conjunction with others has a substantial effect upon interstate commerce.

You say there is no remedy. About 47 of the 48 states, I think, have their own anti-monopoly statutes where interstate commerce is not an ingredient at all. The plaintiff isn't remedyless. I can't do any more than quote to you from what the Supreme Court said as to the three ingredients of these things.

The Court: I realize what the ingredients are, the things they have to prove, at least I think I do, but I don't see how you can claim that the arrangements had here in California did not have a substantial effect upon interstate commerce. I am frank to say the problem—I may be wrong, and I am just talking and letting you know what I am thinking—

Mr. Works: That's all I am doing, your Honor.

The Court: The problem that concerns me in this is how a person is going to be able to prove what the damage was.

Mr. Works: That is the third ingredient. [20]
That problem is with us.

The Court: I know there is that problem. You can have all the theories you want, but you still have to convince the trier of the facts that you have been damaged.

Mr. Works: That is right.

The Court: I think I might make a finding this did have a substantial effect on interstate commerce and then it would be back in your lap as quickly as before.

Mr. Works: That is possible, your Honor. All I am saying is the burden is on them to prove it.

The Court: I realize that the burden is upon them to prove that.

Mr. Works: On the appeal, it stood admitted, because that was a motion to dismiss.

The Court: I realize the difference. I am sorry I did not go ahead and try the case at the time. I thought I was deciding a point of law and we would get a ruling on it.

Mr. Works: But we haven't got it.

The Court: And that that would save everybody expense, because I realize that after you get through one of these cases, it makes it so expensive that sometimes it denies a person the right to appeal. In other words, I felt this way, that the plaintiff was in a position, if I had tried the case, because of the expense of the record—I don't know who they are or anything about them—it would have made them [21] think twice before they would have appealed because of the expense involved in the preparation of the

record being so great. That is the thought I had in mind.

Of course, I did not know what way the case would go, but the way I was thinking at that time, particularly in view of the Supreme Court's ruling on the raisin case at Fresno, that they probably would get all the evidence in and I would still rule as I had before, as I figured the law in my own mind, and it might have deprived them of the right of an appeal because the expense was so great.

Mr. Works: Well, we wanted to have a quick decision of the question, too.

Our views as to damages may be expressed rather briefly. If there is anything, you Honor, that sticks out all over this picture as the result of the, let us say combination or whatever you want to call it, it was simply one thing. It changed the price determination factor from the single net which had been used in previous years, to a joint three-party average or a multiple net, if you want to use that term. There is no question but what that was, we say, the only result, but under any concept, it was the primary result.

The Court: If I remember correctly, the plaintiff's contention in that respect is that breakdown of competition would require less efficiency.

Mr. Works: I will get to that, your Honor. I say even [22] from his own standpoint, the primary result was the switch from the single to the multiple net. We have stipulated here as to what the single net was for these three years, the Clarksburg single net, so, prima facie, without going into these other elements, their damages can be measured mathemati-

cally by applying the differential between the single net and multiple net for the very years in question, 1939, 1940, and 1941.

If they want to go ahead and show other damage, show lack of efficiency and what-not, as they charge, they certainly have that privilege, but I say to you, if I may, that their prima facie damage is the difference between the single and the multiple net for these three years.

Now, if they say our operations were inefficient and, contrary to all human experience, we are trying to lose money instead of make it, they may prove that, if they can, and then they may prove, if they can, what the result was.

They were growing for us. Your Honor knows this sugar setup. It was a profit-sharing proposition, pure and simple. We would sell the sugar, figure the net return, and they would get a certain percentage of what we got. They were in the same boat we were. If we made money, then they made money. If we lost money, then they would lose money. I am talking about the single net now.

So I say in a situation of this sort, it is [23] utterly improper—I am again stating our position—to go into other years, such as the plaintiff seeks to do by four different methods so far. He wants to use 1937, 1938 and 1942 figures to determine damages for 1939, 1940, and 1941, but his damages for 1939, 1940, and 1941 can be shown arithmetically by the difference between the single and multiple net for those three years.

The Court: The only thing is, counsel, don't you

think that the factors that entered into the prices for the various comparative years you are seeking to use should be considered? What I mean is, you say that they have nothing to do with it, but I am here trying this case and that is part of his theory. I have always believed in trying a case, particularly without a jury, that each man should have an opportunity to put in his theory of the case.

Mr. Works: We are not going to object to it, your Honor.

The Court: For instance, if there is a difference in the price, then I think you ought to be in a position to show why.

Mr. Works: Exactly. We are not going to object to his going into these other years.

The Court: In other words, there may be factors which should also be taken into consideration. I can very readily see that a 1942 factor would hardly be fair because then you [24] are getting into the war period. I presume it would depend a whole lot on the price of sugar during those periods and, after all, it depends on his theory for damages, as I understand it to be, which is that that plan or the plans as a whole resulted in a lower price for beets than he would have received if those beets had been put through the plant for which he had a definite contract. What do you call that one, Clarksburg?

Mr. Works: The Clarksburg plant is the one which bought the plaintiff's beets, yes.

The Court: As I recall the statement the other day, that was the normal place for those beets to be processed.

Mr. Works: I don't know of what importance Oxnard is in the plaintiff's theory now, but what I was talking about was simply our views as to their going into other years when you have definite data as to the years in question.

Now, your Honor, if you will look at these cases where you have a situation where somebody is out of business for a given year, like in the Story Parchment case, where the effect of the combination was to put it out of business, he didn't do any business after that, so he didn't have any figures for the years the conspiracy was in operation.

The Court: I haven't read the plaintiff's brief. It was just filed the other day. It came in and I saw it. I saw it yesterday morning, but I haven't had an opportunity to study it. [25]

Now what I want to do is get this case boiled down to what the factual situation is, and then you gentlemen can brief it. [26]

Mr. Works: That is fine.

The Court: And I hope we can get this record in such shape that a reviewing court will have something intelligible before it.

Mr. Works: I am sure we will all cooperate to that end, your Honor. May I make a statement off the record. It has nothing to do with the issues.

The Court: Off the record.

(Discussion had off the record.)

Mr. Arndt: If the court please, I cannot permit counsel's statement regarding the Supreme Court decision to go uncontradicted. It is so completely in

error and so completely omits what the Supreme Court actually stated.

I am reading from the official decision that I received from the clerk of the court. I am reading at page 15. The court says:

“It is clear that the agreement is the sort of combination condemned by the Act even though the price fixing was by purchasers and the persons especially injured under the treble damage claim are sellers, not customers or consumer. And even if it is assumed that the final air of the conspiracy was control of the local sugar beet market it does not follow and is outside the scope of the Sherman Act.”

Now, I will read from the next page, page 16. [27]

The Court: Just a moment, Mr. Arndt. I take the position at this time in approaching this case that it comes within the purview of the Antitrust Act and I am going to receive evidence on that basis and when we get through then I am going to give counsel an opportunity to file in the form of briefs anything that they desire.

Mr. Arndt: Then as to counsel's statements regarding a profit-sharing plan, everybody was in the same boat. The evidence is going to show one very interesting thing and I think I should call it to your Honor's attention as a sort of opening statement in view of the statement made by Mr. Works, and that is this.

During these years, 1939, 1940, 1941 and particularly in 1939 and 1940, substantial portions of the sugar was not sold during that particular crop year but was sold in the next crop year.

Instead of giving these plaintiffs the benefit of that the defendant took the entire benefit of the increase in price that occurred.

In the second place they shipped substantial portions of the sugar beets from the Clarksburg district to the Oxnard district and thereby taking it out of the overhead of the Clarksburg district and putting it into the overhead of the other district and the added price that was secured by Oxnard, because of the process they had called the Stephens process, [28] all went to the defendant. As a consequence the defendants have made hundreds of thousands of dollars over and above their share of the profits that they otherwise would have made and for them to say this is a profit-sharing plan and everybody is in the same boat——

The Court: Let me ask you this question. Doesn't that question come under your accounting count? In other words, suppose there hadn't been this so-called combination agreement that same practice could have been carried on, could it not? In other words, did the conspiracy have anything to do with that practice or enable them to carry on that practice?

Mr. Arndt: In the first place it enabled them to do so because we had no remedy. We had no one else we could go to. And in the second place it goes to the point that we must disregard their individual returns for 1939, 1940 and 1941 which Mr. Works wants to use as the basis for damages.

We cannot use those, first, because the entire contracts are invalid and everything connected with them and, secondly, because of these practices that they

used which rendered unfair and unjust the use of their individual net returns because of these practices.

The Court: But how are you going to draw the line between matters that may be considered as damages and those that may be considered under the accounting angle? [29]

Mr. Arndt: A lot of matters are pertinent to both, your Honor.

The Court: In other words, I believe you made the statement that a recovery on the case we are trying now—the feature of it we are trying now, if you prevailed in that then the other would fall.

Mr. Arndt: Yes, your Honor.

The Court: And if you failed in this you could still go ahead with your accounting feature.

Mr. Arndt: Yes, your Honor, and that was based upon my theory that the contracts are void.

The Court: I realize that.

Mr. Arndt: That is the theory.

The Court: The contracts are void and then you would be entitled to receive your reasonable value for the beets.

Mr. Arndt: That is right.

The Court: There is one matter that is not clear in my mind and that is, assume for instance that there had been no arrangement whereby you have no place to dispose of your beets, what did that have to do with their shifting the beets from Clarksburg to Oxnard or vice versa? In other words, they could have still gyped you on that basis according to your theory.

Mr. Arndt: They could still have, your Honor.

The Court: But would that have anything to do with the [30] combination feature of the case?

Mr. Arndt: Its importance is to show that we cannot accept Mr. Works' theory of damages because the net return, the individual net return of Crystal during those three years is impregnated with that practice—these two practices of carry-over and the shifting to Oxnard, thereby rendering the figures that they present useless as the basis of determining any reasonable value.

The Court: Let me see if I can state it and see if I have your point in mind. It is your theory that inasmuch as they intermingled, you might say, the refining of the sugar and the processing of the beets between the two refineries that there is no way to determine what was the proper amount you should have received from the beets at the Clarksburg refinery.

Mr. Arndt: I wouldn't say there is no way of doing it.

The Court: I mean with mathematical accuracy.

Mr. Arndt: I will say the Clarksburg figures are not accurate—to take the net Clarksburg figures are not accurate in view of what happened and we can't take the Clarksburg figures because of what happened.

The Court: It seems to me that would come under your accounting feature.

Mr. Arndt: Our problem here is to determine what was the reasonable price of beets during those three years at the [31] place of production in San Joaquin Valley, California.

Now Mr. Works says we should take the individual

net return under these contracts and that is the fair price. I say that is not the fair price, first, because the contracts are void and you can't use them at all and, secondly, even if the contracts were not void, regardless of that, the net was so figured by disregarding these two important elements that they do not reflect under any circumstances a fair price. And I will produce figures in evidence which will, I think, substantiate that from a third point of view.

For example, it is our contention and I think the evidence will show, that the conspiracy went much further than the mere fixing of the price on the growers; that the conspiracy went into the selling of the sugar itself and that under the method that sugar was sold the sales of sugar was based upon seaboard base points.

By doing that the amount of freight that was paid depended entirely upon the sales program of the company. If the company sold most of its sugar in the western states and little of it in the midwest or eastern states it would have a relatively lower cost of freight. If it sold more in the eastern seaboard states it would have a relatively higher cost of freight and the figures that we will present show this remarkable situation, that in 1938, which was the year before the conspiracy and in the year 1942, which was [32] the year after the conspiracy, the percentage that freight bore to gross sales price was practically the same. But during the period of conspiracy the freight jumped way up. Why did the freight jump way up? Because during that period they had some sort of an agreement among themselves to so handle their

sales that each would have approximately, as near as possible, the same freight charges because the freight charges were deducted in reaching the net.

So, we have the situation that in 1938, before the conspiracy, Crystal paid a certain price to the growers. The next year immediately there was a drop due primarily to the increase in freight.

During the three years there was this increase in freight as soon as the conspiracy ended the freight decreased again and the return to the growers increased again. In other words, that may be a mere coincidence but we feel that the figures that we will show will develop that to claim that that was a mere coincidence, happening both before and after the conspiracy——

The Court: Well, you are an optimist, Mr. Arndt. You are assuming that what you are discussing now was the only thing that had any bearing on the cause and effect.

Mr. Arndt: Well, I am certain the documents that will be presented in evidence will show and I will present a chart thereof to your Honor, the evidence here will clearly show [33] the situation the year before and the year after the conspiracy as compared to the three years of the conspiracy. And the situation regarding freight rates as shown by their own statements is such that it just couldn't be a mere coincidence and that taken in connection with the other testimony which we will develop that this entire plan of the joint return came from the sales department——sugar sales department and not from the production department and various other matters which we will

produce I think will draw the necessary influences, but I think this all started when I started to offer in evidence a stipulation of fact and then Mr. Works——

The Court: I think this has been an hour well spent, counsel, in trying to clarify the position of the parties. It has been helpful to the court.

I haven't looked upon it as being controversial in one sense. It has been more of an exposition of each one's position in the case.

Before we start to introduce your evidence I think we should take a five-minute recess and discontinue talking and get down to the meat of the case.

(Short recess.)

The Court: You may proceed, gentlemen.

Mr. Works: As I understand it, your Honor, as to these stipulations, all objections will be deemed reserved and we do not have to take up any time with them as we go along? [34]

The Court: I think that can be stipulated to.

Mr. Arndt: I will so stipulate. ..

Mr. Works: Yes. It will save a lot of time.

The Court: Did you make your corrections during the recess?

Mr. Works: I have them on my copy. I will do it now if that is agreeable.

Mr. Arndt: I was going to read it into the record.

The Court: You do not need to read the stipulation?

Mr. Arndt: Very well.

The Court: This is what you call your pre-trial stipulation?

Mr. Arndt: That is right.

Mr. Works: Yes, your Honor, the stipulation of facts and it is embodied in the pre-trial stipulation. I think it is the first document under the cover which is marked pre-trial stipulation.

The Court: Yes. Gentlemen, it seems to me the matter on page 9, paragraph 30 and 31, is so obvious it couldn't be misunderstood.

Mr. Works: We all understand it.

The Court: And in addition to that the record shows what it is if there is any dispute.

Mr. Works. All right.

Mr. Arndt: That is right. In other words, it is [35] formally stipulated.

Mr. Works: We should say this, that the cents and dollars in those two tables in paragraphs 30 and 31 should be viewed either as cents or dollars per pound or per hundred pounds.

Mr. Arndt: So stipulated.

The Court: Mr. Arndt, do you desire to have the stipulation deemed read and copied into the record by the reporter?

Mr. Arndt: Yes, your Honor, we can do that.

Mr. Works: Let us say then for the purpose of the daily, it will not be copied now but if there are any proceedings subsequently then in making up of the record the stipulation may be put in as if it had been a part of the transcript at the present time. Is that what you Honor has in mind?

The Court: No; he was going to read it into the

record. Apparently what he wants to do is build up his record now and of course if we build up the record now on any appeal in this case the record will not have to be rewritten, which would mean that the reporter would copy this into the record at this time. There is no occasion to take the time of the court to read this because I have already read it and we have discussed it many times. But as I understand it you are building up your record now so that it can be used on appeal by either side? [36]

Mr. Works: Yes, that is correct. I understand it now.

The Court: The record will show the stipulation of facts as having been read in court and will be copied by the reporter into the record.

Mr. Works: That is perfectly satisfactory. Then shall we do this? We will take the evidence and then I think the case, shall I say abstrusely as to the evidence, should perhaps be briefed when we get through. That would be our preference. There is so much evidence here that I don't think an oral argument would do it justice. I don't think in an oral argument we could do justice to our positions.

The Court: Gentlemen, I think both of you know I don't encourage oral argument because I can read better than I can listen. I am rather a poor listener.

Mr. Works: And I can write better than I can talk sometimes.

The Court: Except I have had an experience lately with reference to briefs when I thought I would have been better off if I had listened rather than tried

to read the books that have been submitted. There is no reflection on counsel present.

Mr. Works: I can't speak for Mr. Arndt but I believe in short briefs.

The Court: I have never seen a short brief yet.

Mr. Works: Well your Honor, I will try. [37]

The Court: Then as I understand it, Mr. Arndt, we are building up the record now so that the daily transcript when we are through, will be a record so it will not have to be rewritten in the event of anybody being dissatisfied and it is hard to realize that I can make any decision in this case without dissatisfying somebody.

Mr. Arndt: So far I haven't ordered a copy of the transcript daily, but under those circumstances I will have to order a copy of the transcript.

The Court: That is a matter for you gentlemen to determine. I am not encouraging you one way or the other, but I think we might as well face the facts in this case. This case is of such importance that whoever loses is going to appeal and then you are going to have to have a transcript.

Mr. Works: Either way is all right with me, your Honor. Of course if we were to make up a printed record and if this document were not copied into the transcript now it would have to be copied into it and set up for the printed transcript later on. Whether we do it now or later on is immaterial. It may be material to Mr. Arndt, but we have ordered a transcript and it makes no difference to us one way or the other.

Mr. Arndt: Off the record.

(Discussion off the record.)

The Court: Very well, the reporter will copy [38] the stipulation of facts into the record at this place.

(Following is the stipulation of facts:

“In the United States District Court for the
Southern District of California,
Central Division

No. 4643 BH

MANDEVILLE ISLAND FARMS, INC., a corporation, and ROSCOE C. ZUCKERMAN,
Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,
Defendant.

No. 8353 BH

G. K. EVANS,
Plaintiff,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,
Defendant.

STIPULATION OF FACTS

Subject to such objections, reservations or limitations as are hereinafter specified by the respective parties hereto, it is stipulated that the following facts are true and may be taken by the court as true;

1. The farms operated by plaintiffs Mandeville Island Farms, Inc. and Roscoe C. Zuckerman during the 1939, 1940 and 1941 crop years and on which the sugar beets sold to [39] the defendant were grown, were located in San Joaquin County in Northern California. The farms operated by plaintiff G. K. Evans during said crop years and on which the sugar beets were sold to defendant were grown, were located in Contra Costa County in Northern California.

2. The only practicable market available to plaintiffs and other beet growers in California north of the 36th parallel and during the crop years 1938-1941 was sale to one or more of the companies having factories in California.

3. The factories referred to in paragraph 2, above, were owned and operated by Crystal, Spreckels and Holly in Northern California and by Holly, Crystal and Union in Southern California.

4. During the crop years 1937 and 1938, growers in California contracted with one or more of the companies referred to in paragraph 3, above, or with Los Alamitos Sugar Company to grow beets and to sell the entire crop of sugar beets covered by the particular contract to that contracting company, under a form of contract prepared by the particular contracting company.

5. The contracts in use during the crop years 1939, 1940 and 1941 in Northern California provided that the beet growers must plant, on the acreage contracted with a particular processor only seed furnished by that processor.

6. During the crop years 1937 and 1938 Crys-

tal [40] contracts for Northern California fixed the price of beets by a formula containing two variables: The processor's net returns (as the term was defined by the growers' contracts) per 100 lbs. of sugar received by Crystal from sugar manufactured at the Clarksburg factory and sold by Crystal during the 12 months period commencing August 1 of the crop year in question, and the sugar content of the beets grown by the particular grower determined according to Crystal's laboratory tests.

7. During the 1939, 1940 and 1941 crop years all of the processors who had factories in Northern California used a growers' contract under which the price to be paid for beets was determined by a formula in which one of the variables was the sugar content of the beets grown by the particular grower and the other was the average net returns (as that term was defined in the growers' contract) received for sugar manufactured at the beet sugar factories located in California north of the 36th parallel and sold during the period of 12 months commencing August 1st for the crop year in question.

8. The contract used by Crystal at its Clarksburg factory for the crop year 1941 was the last one in which the method of computing beet prices was based upon a formula which used as one variable the average net returns (as that term was defined in the pertinent growers' contract) received for [41] sugar manufactured at all beet sugar factories located in California north of the 36th parallel and sold during specified periods of time by said factories. In the crop year 1942 Crystal reverted to the type of contract

used by Crystal in the crop years 1937 and 1938 and described in paragraph 6, above.

9. Sugar beets were grown during the crop years 1938 to 1942 on large acreages in Northern California, Southern California, Utah, Colorado, Michigan and Idaho.

10. The sugar beets grown in California and Colorado during the crop years 1938 to 1942, when harvested, were not sold in central markets, as were potatoes, onions, corn, grain fruit and berries, but were produced by growers under contracts with processors, and, upon being harvested, were delivered to those processors and taken to their beet sugar factories where, by an elaborate process, sugar was extracted from the sugar beets.

11. Sugar beets, when harvested, are bulky and semi-perishable.

12. The sugar manufactured by Crystal at its Clarksburg factory, from beets grown in Northern California during the crop years 1940 and 1941, was sold both in interstate commerce and in intrastate commerce in California.

13. Prior to the crop year 1939, Crystal, Holly and Spreckels had competed with each other as to the performance, ability and efficiency of their manufacturing, sales and [42] executive departments, and each strove to increase sales returns and decrease expenses. (The defendant by stipulating to this does so without any implications or admission that in the crop years 1939, 1940 and 1941 it did not so compete.)

14. During the crop year 1942 the average net returns (as that term was defined in the 1942 Clarks-

burg factory growers' contract) from sales of sugar produced at Crystal's Clarksburg factory, and used by Crystal as one of the bases for payment to its growers in Northern California, was 4.246c.

15. During the crop years 1939, 1940 and 1941 Crystal, in purchasing beets from growers in California used three forms of contracts each cropping year. One of these forms provided for payment based in part upon the average net returns (as that term was defined in the growers' contract) received from sugar manufactured at all beet sugar factories located north of the 36th parallel in California and sold during the period of 12 months commencing August 1st of the crop year in question and two of them provided for payment based in part on the average net returns (as that term was defined in the growers' contracts) received from sugar manufactured at all beet sugar factories in Southern California, and sold during the period of twelve months commencing August 1 of the year in question.

16. The beet sugar factories located in [43] California north of the 36th parallel in the crop years 1939, 1940 and 1941 were owned and operated by Crystal, Holly and Spreckels. The beet sugar factories owned and operated in Southern California during said period were owned and operated by Holly, Union Sugar Company and Crystal.

17. Contracts in use in Southern California during the cropping years 1939, 1940 and 1941 referred to four southernmost sugar companies. These were Holly, Union, Crystal and Los Alamitos Sugar Company. However, Los Alamitos Sugar Company did

not operate a factory in Northern or Southern California during said crop years so that while there were four beet sugar companies operating in Southern California during the said crop years, there were only three factories operating.

18. Contracts used by Crystal, which during the crop years 1939, 1940 and 1941 provided for payment based upon a formula in which one of the variables was the average net returns (as that terms was defined in the growers' contract) received for sugar manufactured at all beet sugar factories located in California north of the 36th parallel and sold during the period of 12 months commencing August 1st of the crop year in question, were used during said years by Crystal for contracting with sugar beet growers in California growing beets in the delta or island region of the San Joaquin and Sacramento Rivers and where the delivery costs were less [44] to Clarksburg (where Crystal's Northern California factory was located) than to Oxnard (where Crystal's Southern California factory was located). Copies of these contracts are attached to the amended complaint herein as Exhibits B, C and D.

19. For growers of sugar beets located in the southern part of the San Joaquin Valley south of the delta or island region of the San Joaquin and Sacramento Rivers, Crystal used a form of contract in which payment to the growers of the beets was based upon a formula in which one variable was the average net returns (as that term was defined in the growers' contracts) received from sugar processed at all beet sugar factories in Southern California and sold dur-

ing the period of 12 months commencing August 1 of the crop year in question. Copies of such contracts for 1939, 1940 and 1941 are attached to 'Amendment to Answer to First Amended Complaint as Amended' in the case of Mandeville Island Farms v. American Crystal Sugar Company as Exhibits 15, 17 and 19.

20. The contracts entered into by Crystal with sugar beet growers in Southern California other than growers in the San Joaquin Valley, provided for payment based upon a formula in which one of the variables was the average net returns (as that term was defined in the growers' contracts) received by the four southernmost beet sugar companies in California for sugar manufactured in their Southern California [45] factories and sold during the period of 12 months commencing August 1st of the crop year in question. Copies of said contracts are attached to the above mentioned Amendment to Answer to First Amended Complaint in the above mentioned case as Exhibits 14, 16 and 18.

21. During the crop years 1939, 1940 and 1941 all freight for transporting sugar beets in California by Crystal on beets purchased by Crystal was paid for by Crystal regardless of the form of contract and regardless of the part of the state in which the beets were grown.

22. During the crop years 1939, 1940 and 1941, no sugar beets produced south of the 36th parallel and delivered to Crystal were shipped to the Clarksburg plant of Crystal for manufacturing, but some of the beets produced north of the 36th parallel and delivered to Crystal were shipped by Crystal to Oxnard

and there manufactured into sugar. All of the beets grown in the southern part of San Joaquin Valley on contracts of the type attached as Exhibits 15, 17 and 19 to the aforesaid Amendment to Answer to First Amended Complaint, as amended in the aforesaid action, were shipped to Oxnard.

23. The beets which were grown under Clarksburg contracts during the crop years 1939, 1940 and 1941 and which were shipped to Oxnard for processing, were mingled with beets delivered under Oxnard contracts (Exhibits 14, 15, 16, 17, 18 and 19, above mentioned), and their identity was lost. [46] Defendant can determine the tonnage of beets received and paid for from the San Joaquin-Sacramento delta and which were designated for shipment to Oxnard for processing into sugar during each of said years, but cannot determine the tonnage of such beets received at Oxnard or the amount of sugar produced therefrom.

24. In 1939 plaintiff Mandeville delivered 22,355.6 tons of sugar beets of 18.25% average sugar content to Crystal and 14,348 tons thereof were designated by Crystal for shipment to Oxnard to be processed into sugar. The rest were shipped to Clarksburg factory to be processed into sugar.

25. In 1940 plaintiff Mandeville delivered 25,430.3 tons of sugar beets of 15.55c average sugar content to Crystal and 13,167 tons thereof were designated by Crystal for shipment to Oxnard to be processed into sugar. The rest were shipped to Clarksburg factory to be processed into sugar.

26. In 1941 plaintiff Zuckerman delivered 14,144.7 tons of sugar beets of 15.47% average sugar content

to Crystal and 10,381 tons thereof were designated by Crystal for shipment to Oxnard to be processed into sugar. The rest were shipped to Clarksburg factory to be processed into sugar.

27. In 1941 Evans delivered 4,401.7 tons of beets to Crystal of an average sugar content of 17.53%. These beets were mingled with beets from other growers which were shipped to each factory. Of the mingled beets, some were shipped by [47] Crystal to Oxnard and some to Clarksburg, but defendant does not know and cannot ascertain how many.

28. The net returns (as that term was defined in the growers' contracts in use at Crystal's Oxnard factory for the crop years 1939, 1940 and 1941) from the sale of sugar manufactured at Crystal's Oxnard factory included the net returns from sugar produced from some of the beets grown by plaintiffs and manufactured at Oxnard, if such sugar was sold during the particular crop year. None of the net returns (as that term is defined in the growers' contracts in use at Crystal's Clarksburg factory for the crop seasons 1939, 1940 and 1941) from the sale of such sugar were included in the determination of the net returns used as one of the basis for the payment to plaintiffs for their sugar beets.

30. The average joint net returns for 1939, 1940 and 1941 under the operations of the sugar factories in California north of the 36th parallel and those in Southern California were as follows per pound of sugar sold:

Year	Northern California	Southern California
1939	3.131c	3.378c
1940	3.160c	3.398c
1941	3.950c	4.066c

31. The average single net returns to defendant Crystal for sugar manufactured at its Clarksburg factory and sold during the period of twelve months commencing on August 1 [48] of the years specified below, and computed in all other respects as were the Northern California average joint nets specified in paragraph 30 hereof, and computed in all respects as were the average single net returns for sugar so manufactured and sold during the crop years of 1937 and 1938, were as follows per pound of sugar sold:

Year	Clarksburg Single Net
1939	3.123c
1940	3.163c
1941	3.970c

all as reported by Crystal to the Sugar Division of the United States Department of Agriculture by reports dated, respectively, January 27, 1941; November 7, 1941; and November 25, 1942. Copies of said reports are attached as part of the answer of said defendant to Interrogatory No. 74 heretofore propounded by plaintiffs Mandeville and Zuckerman.

32. The Crystal-Oxnard contracts, copies of which are attached to said Amendment to Answer to First Amended Complaint as Amended in said action as Exhibits 14, 16 and 18, contain a different scale of beet prices than the scales used in the contracts for equivalent crop years signed by plaintiffs for beets of the same sugar content and for a given net return (as

that term was defined in the growers' contracts in question).

34. If beets of the same sugar quantity and content [49] as delivered by plaintiff had been delivered to Oxnard under Exhibits 14, 16, and 18 attached to said Amendment to Answer to First Amended Complaint as Amended in said action, plaintiffs would have received more than they did receive in the following sums:

a) Mandeville in 1939 would have received \$17,-892.18 more than it did;

b) Mandeville in 1940 would have received \$18,153.95 more than it did;

c) Zuckerman in 1941 would have received \$8,-757.98 more than he did;

d) Evans in 1941 would have received \$2,374.49 more than he did.

This item 34 assumes that all of each plaintiff's beets for the designated year which were contracted to Crystal would have been delivered to Crystal at its Oxnard factory under the designated contracts, and that the net returns (as that term was defined in each of said contracts) at the Oxnard factory for each designated year would not have been diminished by the additional sugar resulting from these additional deliveries—which is not admitted by defendant.

35. Certain beets were produced in Northern California by growers under contract to Crystal in the crop year 1941 and were delivered to Crystal in the crop year 1941 and manufactured into sugar in the crop year 1941. All of [50] the sugar so produced, however, was not sold in the crop year 1941. A portion of it was sold in the crop year 1942. As to the

portion sold in the crop year 1942, the funds received therefor were included in calculating the net returns which formed one of the bases for the payment for the 1942 crop beets, and such funds were not included in calculating the net returns which formed one of the basis for the payment for the 1941 crop beets.

36. Some molasses produced at Crystal's Clarksburg factory during the crop years 1939, 1940 and 1941 from the processing of sugar at Clarksburg was shipped by Crystal to the Oxnard factory during the crop years 1939, 1940 and 1941. This molasses was mixed at Oxnard with molasses produced at Oxnard in the manufacture of sugar. The mixed molasses was processed during the crop years 1939, 1940 and 1941 into sugar at the Oxnard plant. The sugar so manufactured was mingled with and could not be distinguished from and was sold with sugar manufactured direct from sugar beets at the Oxnard factory. The average net return which was used under the Southern California growers' contracts for the designated years as one of the bases of payment to growers for their beets reflected the funds received from sugar manufactured from such molasses and sold during the period specified in each of the said contracts.

37. During the crop years 1939, 1940 and 1941, certain byproducts resulted from the processing of beets into [51] sugar at both the Clarksburg and Oxnard factories of Crystal. These byproducts at the Clarksburg plant included molasses and pressed pulp; the byproducts of the Oxnard factory included molasses and dried pulp. Sales were made of these byproducts during each of the said crop years, but none of the funds received from said sales were in-

cluded in the determination of the 'average net return' as that term was used in the growers' contracts for the designated years. Some of the molasses produced at the Clarksburg factory was shipped to the Oxnard factory, where a process known at the Steffens process was used for the extraction of sugar from molasses. The Clarksburg factory did not have a Steffens plant. The Steffens process used at the Oxnard factory was used in extracting sugar from some of the molasses produced at the Clarksburg factory and shipped to Oxnard. The funds received from the sale of sugar so produced were included in the 'average net return' as that term was used in the growers' contracts entered into between Crystal and those growers who delivered beets under the Oxnard factory contracts for the designated years, but none of said funds were included in the determination of the said 'average net return' used as one of the bases of settlement with the growers who delivered beets under the Clarksburg factory contracts for the designated years.

38. During the crop years 1939 to 1941, both inclusive, three beet sugar factories were located [52] in the Arkansas Valley in Colorado, one of which was owned and operated by Crystal and was located at Rocky Ford, Colorado, one of which was owned and operated by Holly and which was located at Swink, about five or six miles from Rocky Ford, and one of which was owned and operated by the National Sugar Manufacturing Company and was located at Sugar City, about fifteen miles from Rocky Ford. During said crop years, both Crystal and Holly purchased beets from growers under a written contract, each of which written contracts provided that the price per

ton of beets to be paid the grower should be based on a formula, one of the variables of which was the average sugar content of the beets delivered under the contract, the other variable being the average net return, as that term was defined in each of the said contracts, received for sugar sold by the factories located in the Arkansas Valley in Colorado on the line of the Atchison, Topeka & Santa Fe Railway during the period of twelve months described in each contract. The factory of Holly at Swink, and the factory of Crystal at Rocky Ford, were the only sugar factories located in the Arkansas Valley in Colorado on the line of the Atchison, Topeka & Santa Fe Railway during said crop years.

Dated: January 4, 1950.”)

Mr. Arndt: We next desire to offer certain of the interrogatories and answers thereto.

Now as to those, your Honor, I assume the simplest way [53] would be to read those into the record.

The Court: Whatever you desire.

Mr. Arndt: Unless to save time I can point out each one except the particular ones I want to call you Honor’s attention to for some particular purpose and have them written into the record afterwards.

The Court: Counsel, I think the question and answers that you want to introduce into the record should be read into the record in order that I may follow your theory of the case.

Mr. Arndt: Very well.

The Court: And more intelligently understand it as we proceed.

Mr. Arndt: Very well, your Honor.

Interrogatory No. 1:

Set forth the names and places of residence of each officer of Crystal from January 1, 1937, to the date upon which these interrogatories are answered, and state the office or offices held by each during said period.

(Answer) :

Title and Name	From	To
Chairman of the Board		
C. K. Boettcher.....	Jan. 1, 1937	Dec. 20, 1948
Vice-Chairman of the Board		
W. N. Wilds.....	Jan. 1, 1937	Dec. 20, 1948
President		
W. N. Wilds.....	Jan. 1, 1937	Dec. 20, 1948
Vice-Presidents		
H. E. Zitkowski.....	Jan. 1, 1937	Dec. 20, 1948
J. B. Grant.....	Jan. 1, 1937	May 20, 1947
J. B. Hayden.....	July 26, 1946	Dec. 20, 1948
Secretary		
W. E. Kraybill.....	Jan. 1, 1937	Dec. 20, 1948
Assistant Secretaries		
J. B. Hayden	Jan. 1, 1937	Dec. 20, 1948
J. A. Summerton.....	Jan. 1, 1937	Dec. 20, 1948
C. L. Allen.....	Jan. 1, 1937	Mar. 10, 1944
H. von Bergen.....	Aug. 6, 1948	Dec. 20, 1948
Treasurer		
W. E. Kraybill.....	Jan. 1, 1937	Dec. 20, 1948
Assistant Treasurers		
J. B. Hayden.....	Jan. 1, 1937	Dec. 20, 1948
J. A. Summerton.....	Jan. 1, 1937	Dec. 20, 1948
C. L. Allen.....	Jan. 1, 1937	Mar. 10, 1944
H. von Berger.....	Aug. 6, 1948	Dec. 20, 1948
General Counsel		
J. B. Grant.....	Jan. 1, 1937	May 20, 1947
M. A. Lewis.....	Aug. 4, 1947	Dec. 20, 1948
Comptroller		
J. A. Summertone.....	Aug. 4, 1947	Dec. 20, 1948
Auditors		
R. H. Graham.....	Jan. 1, 1937	Nov. 30, 1947
E. E. Merrill.....	Dec. 1, 1947	Dec. 20, 1948

The place of residence of the above named individuals during the periods shown was Denver, Colorado.

The Court: Let me ask, you are reading from what?

Mr. Arndt: The answers to interrogatories.

The Court: And those answers are on file?

Mr. Arndt: Yes, Your Honor.

The Court: May I ask is there any objection to the introduction of all the answers?

Mr. Arndt: Yes.

The Court: There is objection?

Mr. Arndt: Yes, as far as I am concerned. I am not offering all of them.

The Court: The only thing is I am listening now to the names of officers of the company. What does that mean to me in trying to pass upon the issues in this case?

Mr. Arndt: Because, Your Honor, subsequently I take the deposition of certain of these officers and I endeavor to find out who talked with the other two companies and who made the arrangement and I get certain responses from these various persons whose depositions I have taken. And those responses will be subsequently offered by me in evidence.

The Court: All right, proceed.

Mr. Works: May I clarify our position on that, Your Honor? [56]

Your Honor may or may not want to hear that testimony but we have already stated our view that, Your Honor, has the right to infer an agreement to this joint net arrangement. Now, who was present

or who wasn't, it seems to me, is rather immaterial in view of that concession but I say if Your Honor desires to hear it it is all right with us.

Mr. Arndt: Our position went far beyond that. It is our position that certain inferences can be drawn far beyond that inference and I think if they do not produce people here who made the agreement or who testified as to what was said then we are going to argue that certain additional inferences can be drawn therefrom.

The Court: Well, as I say, I am going to permit you to introduce your theory of the case but I have also in mind Mr. Whyte's statement that I can infer that there has been an unlawful agreement between the parties.

Now, to what extent that affected you and to what extent it has damaged you is something else.

Mr. Works: May I say this, Your Honor, our concession went no further as I have stated.

I stated the court could infer there was an agreement or understanding between the three companies to use this joint or multiple net basis of settlement with the beet growers. Now, whether it is unlawful or not is Your Honor's province but we make no such concession. [57]

The Court: I take it, in combination with the Supreme Court decision, and I may be one track minded, counsel, but I am still going back to the question that has bothered me throughout this whole proceeding and that is whether or not they can establish damages by reason of that. In other words, they first started out with this sugar allotment and

they abandoned that because you were not under that arrangement at that time.

Mr. Arndt: Your Honor, I wouldn't say we abandoned that. We have used this as our present theory. If the court throws this theory out we can pick a half dozen other theories. We haven't abandoned anything as far as that is concerned, because we intend to show they were under the act as part of our evidence here.

The Court: I thought you struck that from your complaint.

Mr. Arndt: No, all we struck from the complaint was the allegation that those were the reasonable prices. That is all we struck.

The Court: But didn't that have that effect?

Mr. Works: I had always assumed so.

Mr. Arndt: I don't think so.

The Court: I am not trying to make it hard for you, Mr. Arndt, but I am trying to get you down to earth a little bit so I can follow your theory. I think in a sense I can [58] understand your theory.

Mr. Arndt: But, Your Honor, when Your Honor throws words at me such as "abandon" that is a harsh word and I must disavow it.

The Court: All right, you disavow it and let the record so show.

I am not trying to commit you to anything, but I was wondering this. You have read the names of the directors and the other officers of the company. Counsel says they entered into this agreement and what inference is to be drawn from it is a matter for the court. Now, why can't we, as long as I am going to

have to study these different theories, why can't the questions and answers to the interrogatories, certain ones, be admitted in evidence and those that you wish to emphasize you may read. But reading an interrogatory and an answer like that doesn't mean anything to me.

Mr. Arndt: A lot of these interrogatories are preliminary. Many of them can be done that way. If I may refer to certain interrogatories and have them considered as being read into evidence and then when I come to one that I think is of prime importance to Your Honor I will call that particular one to Your Honor's attention.

The Court: Why don't you do this, Mr. Arndt? With reference to those you call preliminary questions indicate them by number and the answers and have them deemed read and [59] they will be copied into the record.

Mr. Arndt: All right.

The Court: For a quick reference and then those that you wish to emphasize you actually read and if there are any of the interrogatories you feel you want to emphasize that he hasn't you have that same privilege.

Mr. Works: Thank you.

The Court: In other words, we will do like we do in a jury trial. There will be a lot of documentary evidence and it is admitted in evidence and each counsel has a right to read that portion to the jury which he feels is material and important.

Mr. Works: That is quite all right.

Mr. Arndt: But I am not conceding they have the right to offer any particular interrogatory.

The Court: Did they submit any to you?

Mr. Arndt: No. I told them if they wanted any to submit them to me but I never received any. Is it necessary that they be written into the record of the reporter when the answers are a part of the record anyway? Why can't we just incorporate them by reference in the reporter's transcript.

The Court: But look at the size of this file and the work required to correlate it.

Mr. Arndt: These are interrogatories and answers. [60]

The Court: But you try to correlate the record so that they can intelligently be understood either by myself or a reviewing court. The reviewing court will not go through that record unless you have it printed.

Mr. Arndt: Our next is No. 3 which can be handled in the manner the court specified.

The Court: These interrogatories were filed on what date?

The Clerk: The interrogatories of the plaintiff were filed November 22nd, 1948, and the answers to certain of the interrogatories were filed on January 11, 1949.

Mr. Arndt: Then there were some additional interrogatories.

The Clerk: Yes, there are some more down through there.

Mr. Arndt: And certain additional answers. I think there were three sets of interrogatories.

The Court: Very well, the reporter will copy interrogatory No. 3 and the answer thereto into the record.

(Interrogatory No. 3:

Paragraph 5 of the 1939, 1940 and 1941 contracts between Crystal and growers of sugar beets in California north of the 36th parallel refers to "the average net returns . . . received for sugar manufactured at beet sugar factories located in California north of the 36th parallel." State the location of each such factory and the name of the company operating it during each of said cropping years.

(Answer to Interrogatory No. 3): [61]

Clarksburg, California: Operated by American Crystal Sugar Company.

Alvarado, California; Tracy, California; Hamilton City, California: Operated by Holly Sugar Corporation.

Spreckels, California; Manteca, California; Woodland, California: Operated by Spreckels Sugar Company. [62]

Mr. Arndt: I might save time merely reading the interrogatories and then have the answers.

The Court: May I ask you this? Is there anything in those interrogatories and answers that you feel would hurt your case, if answered? In other words, I would suggest that you take the questions and answers and introduce them in evidence.

Mr. Arndt: I don't want to introduce certain of them.

The Court: That is the reason I ask you that question. Is there any answer in there that hurts you?

Mr. Arndt: I can't answer that question, Your Honor. There are too many of them.

The Court: You can proceed your own way. I was trying to be helpful.

Mr. Arndt: Interrogatory No. 3 and the answer thereto.

Interrogatory No. 4 and the answer thereto.

Interrogatory No. 5 A, b, c, d, and the answers thereto. Those were not included on the list I gave you, but were subsequently added.

Mr. Works: Mr. Arndt, pardon me, but there must be a lack of correlation there. Our answer starts 5 C a. Apparently something happened to A and B.

Mr. Arndt: That should read 5 B.

Mr. Works: There is no answer to it.

Mr. Arndt: There is. That answer was filed in your [63] answers that were subsequently filed after the court order, and you will find it on page 5 of the answers. Pardon me. It is on page 2 of the additional answers.

Mr. Works: 5 B?

The Court: May I suggest to both of you that in introducing the various matters by reference, if upon a check either party finds they have got an error and you can't settle it by conference, that the matter be submitted to the court, because it is very easy for either one of you to make an error.

Mr. Whyte: The answer to 5 B and 5 D were

filed February 21, 1949. That is 5 B only. That was filed February 21, 1949.

Mr. Arndt: Then the next is the interrogatory 5 C and the answer thereto.

The Court: Are these preliminary interrogatories, Mr. Arndt?

Mr. Arndt: Well, probably I'd better just read the interrogatories and not read the answers in.

The Court: The only thing is, the court finds it very difficult in examining the record where in one document you have the question and in some other document you have the answer to that question. Some place along the line, in order that these can be intelligently followed, there is going to have to be a document prepared that gives the question and [64] the answer together.

Mr. Arndt: Then I think I had better read it in.

The Court: Why don't you read it in by reference and the reporter will write it up and you will have it in your record and I will read the record.

Mr. Arndt: That I will do, then.

The Court: I am going to have to read this record.

Mr. Arndt: I will return to interrogatory No. 3, which is found on page 2 of the interrogatories, and commences, "Paragraph 5 of the 1939, 1940 and 1941 contracts between Crystal and Growers of Sugar Beets in California north of the 36th parallel," and the answer thereto is at page 9 and starts with the words, "Clarksburg, California."

Interrogatory 4, which is on page 2 of the interrogatories, starts with the words, "Were there any other beet sugar factories located in California," and

the answer, which is found on page 9 of the answers, starts with the words, "There were no beet sugar factories located in California."

5 B, which is on page 2 of the interrogatories, gives the information requested in item 5 A as to subparagraphs b, c, and d, which are dates, "August 1, 1939, August 1, 1940, August 1, 1941," and the answers which appear on page 2 of the additional interrogatories, answers which Mr. Whyte just identified.

The Clerk: Filed February 21, 1949. [65]

Mr. Arndt: 5 C, which interrogatory is on the bottom of page 2 and the top of page 3 of the interrogatories, and the answer is on page 9 of the answers.

Then 6 B, which is on page 3 of the interrogatories, and the answer is on page 15 of the answers.

7 B of the interrogatories, which appears on page 4 of the interrogatories, and the answer on page 16 of the answers.

8 B of the interrogatories, which appears on page 4, and the answer, which appears on page 17 of the answers.

8 D, which interrogatory appears on page 5, and the answer appears on page 3 of the February 21—

Mr. Whyte: I beg your pardon, Mr. Arndt. That is page 2, is it not?

Mr. Arndt: Is it page 2? I have it down here as page 3. It starts with the words, "The requests made——"

Mr. Whyte: Are you speaking of 8 D?

Mr. Arndt: 8 D.

Mr. Whyte: 8 D begins and ends on page 2 of the answers filed February 21.

Mr. Arndt: That was amended on page 3 of the defendants' amended answers to certain interrogatories submitted by plaintiff, and I am referring to page 3 of the defendants' amended answers to certain interrogatories.

Mr. Whyte: When were those filed, Mr. Arndt?

The Court: Gentlemen, you are getting into an [66] impossible situation, as far as your record is concerned. I would like to make still another suggestion and see if I can finally hit upon a happy one. For instance, tomorrow is a holiday. That will give you some time to work. Why don't you go through those interrogatories and say, "Here are certain ones we don't want to introduce in evidence," and then introduce the balance in evidence, with the exception of certain ones, and then have the reporter take this record and write them up?

The reason I mention it is because we had one of these movie interrogatories in here, and I don't know whether you asked more questions than they did or not, but, anyhow, you were close competitors, and it was hard for the court to determine the questions and answers and correlate them. The reporter took the time to write out the question and then the answer underneath, and when we got through, we had a transcript and we had all the questions and answers that were introduced in evidence, that were admitted, right in the transcript.

Either the reporter should do that or counsel ought to do it. You go through the record and determine

the ones you want to introduce, and then either have your own stenographic force write up those questions and answers and introduce them in evidence, or have them deemed read, and the reporter will write them up, so that when you pick up the record [67] here is a question and here is an answer, and you don't have to finger through a lot of pages.

Mr. Works: Either way is all right with us. Mr. Arndt will be introducing the interrogatories, we won't, and whatever way is satisfactory to the court will be satisfactory to us.

The Court: The only thing is by the time we figure out what the evidence is, we will have had a lot of difficulty.

Mr. Arndt: I don't think it can be done tomorrow, but I will be very glad to have each of the interrogatories written out and the answer attached thereto, and I will submit them before the case is closed. I will be very happy to do it, if I have time to do it.

The Court: Time is not a very important element in this case.

Mr. Arndt: I can do that, Your Honor, and I will have it done with sufficient copies so that counsel will have them and everybody will have them. That I can do.

The Court: You can do it any way you want, counsel, but I am just sitting here listening to a lot of figures that don't mean anything to me. I am just wasting my time listening, and you are wasting your time, and everybody else's time, except for the purpose of perfecting your record.

Mr. Arndt: Anyway the court desires, I will do.

The Court: I am going to let you make your own choice. [68] I am just making various suggestions. I can sit here and listen until we get through and if I haven't a record I can understand, that is going to be your fault.

Mr. Arndt: I will have them prepared in typewritten form, each of the interrogatories followed by each of the answers that I desire to use. I am calling Your Honor's attention at this time only to a few of them. I assume that is satisfactory with counsel?

Mr. Works: Oh, yes.

Mr. Arndt: May I then read merely the numbers of those that I will handle in that matter?

The Court: Yes.

Mr. Works: Why read them, Mr. Arndt, if you are going to have them typed up anyway?

The Court: You want to have them in the record to show the numbers?

Mr. Arndt: To show what I am going to supply. There ought to be something here to tie into it, that is all.

Mr. Works: All right.

Mr. Arndt: No. 1, No. 3, No. 4, 5 B, b, c, d, 5 C, 6 B, 7 B, 8 B, 8 D, 9 B, 9 C, 9 D.

Certain letters set forth in the answer to interrogatory No. 11, as follows:

Letter of September 12, 1938, from Lester J. Holmes to Denver office. [69]

Letter of September 19, 1938, from H. E. Zitkowski to L. J. Holmes.

Letter from Lester J. Holmes to Denver office, dated September 28, 1938.

Letter from Lester J. Holmes to Denver office, dated October 12, 1939.

Letter of October 31, 1939, from L. J. Holmes to Denver office.

Letter of November 6, 1939, from Zitkowski to Holmes.

Letter of September 27, 1940, from Holmes to Denver office.

Interrogatory 26, the Haskins and Sells statement on page 29 and the answer thereto.

Interrogatory 32, 33, 38.

That part of the answer to 40 that appears on pages 164, 165, 167, 168, 169 and 170 of the answers to the interrogatories.

No. 50, 51, 52 A, B, C, D and E, 54, 55, 58, 61, 62, 86, 87, 90, 91, 96.

No. 107, 110, 113, 121, 122, 123, 132, 137, 138, 139, 140, 145 C, 145 D, 145 E, 146 A and B, 147, 148, 150 A, B, C, D and E, 151 A, 153, 154, 156, 158 B, 160, 163, and 166.

Evans interrogatory No. 8, 9, and 10.

Those are the ones that I will supply to the record in the manner I have set forth. [70]

I want to call Your Honor's attention to certain of these letters in response to interrogatory No. 11, particularly the letter found at page 52 of the interrogatories, a letter of November 6, 1939, from H. E. Zitkowski to Lester J. Holmes in reply to a letter of October 31, 1939. The first two paragraphs are of particular interest in the letter of November 6th,

which I will read and call Your Honor's attention to.

"On returning to Denver, I find your letter of October 31st with reference to your meeting with the local growers committee on the subject of the 1940 beet purchase contract. I shall in all probability be with you in the near future, and it may be well to permit the matter to rest until that time and then, if it is considered advisable, to discuss the subject further with the growers' representatives. It is difficult to cover such a discussion in a letter without going into it very extensively. Referring briefly, however, to the three points raised, let me give you the following comments.

"Concerning the first objection, which refers to an average net selling price for the sugar produced in Northern California, I think you yourself understand the principles behind this very thoroughly. The principal objective therein is to obtain, as far as this is possible, a higher average net receipt for sugar by avoiding, as much as possible, cut-throat competition, crosshaul of sugar, and other similar practices, [71] all of which tend to depress the receipts for sugar and benefits principally the transportation companies and some of the dealers in sugar to the detriment of perhaps both the customer and the grower of beets, as well as, of course, the processor of such beets."

Then 87 is the interrogatory which reads:

"The answer of Crystal admits the authenticity of the form and contents of those certain contracts, copies of which are annexed to the amended complaint as Exhibits A, B, C, D and E. Exhibit B is

the 1939 growers contract and provides in paragraph 5''——

The Court: I have read those contracts, counsel.

Mr. Arndt: Then it goes on and states:

“Was this change in the method of payment from the 1938 method of using average net return for sugar manufactured at Crystal’s Clarksburg factory to 1939 method of using the average net return of all beet sugar factories in California north of the 36th parallel, made with or without consultation, discussion or conference by Crystal with any of the other manufacturers of sugar in California north of the 36th parallel?”

“Answer: Change referred to in this interrogatory was made with consultation, discussion or conference by Crystal with the other manufacturers of sugar in California north of the 36th parallel.” [72]

The Court: Mr. Works made that same statement this morning.

Mr. Arndt: That will tie in.

The Court: It is one minute of 12:00, counsel.

Mr. Arndt: Pardon me?

The Court: Do you think we will save anything by starting in on something else now?

Mr. Arndt: I was going into an entirely different field, so it would be a good time to adjourn.

The Court: We will take a recess until 2:00 o’clock.

(Thereupon, at 12:00 o’clock noon, a recess was taken until 2:00 o’clock p.m.) [73]

Los Angeles, California,
Tuesday, February 21, 1950, 2:00 p.m.

The Court: You may proceed, gentlemen.

Mr. Arndt: If the court please, I next desire to offer into evidence certain portions of the depositions.

The Court: How can you introduce a portion of a deposition?

Mr. Arndt: If it is an officer of the opposing company it is admissions against interest.

The Court: I am talking about the deposition. How can you pick out a portion of a deposition and say "I am going to introduce this question and this answer but not introduce the rest of it"?

Mr. Arndt: I can do it if for no other reason than it is an admission against interest.

The Court: I haven't any objection but it is something new to me.

Mr. Works: We reserve the right to offer any other portions, Your Honor.

The Court: Yes. I am still up in the air. I want to know how you can take a deposition and then come into court and say: "I am only going to use part of it."

Mr. Arndt: If it is the deposition of an officer of the opposing side then it becomes an admission against interest, if the court please. [74]

The Court: I haven't any objection to it but it is the first time I ever had anybody come into court after taking a deposition and say they only wanted to introduce part of it. Go ahead. It is all right with me.

Mr. Works: Which one is it, please?

The deposition of Mr. Zitkowski. I will follow it exactly until I come to Mr. Wilds. I will follow exactly the portions set forth in the document heretofore served upon you and filed in court and entitled "Portions of the depositions to be used by plaintiffs." I will give the reporter a copy of it.

The Court: If there are any questions or answers read them into the record.

Mr. Arndt: This is merely an identification. There are no questions on this piece of paper.

The Court: But the parts you are going to introduce you will read into the record.

Mr. Arndt: That is right. I am merely giving this to the reporter in case he wants to compare it with the original against some names. This identifies it. This document is on file here and contains nothing of the deposition itself.

The Court: Go ahead.

Mr. Arndt: Taking the first item:

"Q. What is your name—" strike that.

This witness is Mr. H. E. Zitkowski. The [75] first question is:

"Q. What is your name and your connection with the American Crystal Sugar Company?

"A. My name is H. E. Zitkowski. I am general consultant for the American Crystal Sugar Company.

"Q. What positions have you formerly held with the American Crystal Sugar Company and when?

"A. Many and various, ranging from laboratory

(Deposition of H. E. Zitkowski.)

boy more than 50 years ago to assistant chemist, chief chemist, general chemist of all the company's operations; then superintendent and general superintendent and eventually vice president and general manager of production.

"Q. When did you become vice president and general manager? How long did you continue in that position?

"A. I can't tell you just when I became general manager but it was probably about 15 years ago, until March 1st of this year when I relieved myself of the duties and responsibilities of vice president and general manager of production.

"Q. You are the H. E. Zitkowski who signed the first set of answers to the first set of interrogatories in this case? "A. I am." [76]

Mr. Arndt: The second item starts at page 6.

"Q. Did American Crystal Sugar Company sell any molasses, pulp, or other by-products from either Clarksburg or Oxnard in the cropping years 1939, 1940 and 1941? "A. They did.

"Q. Which one of those was sold?

"A. Pulp and molasses; in the case of Clarksburg, pressed pulp; in the case of Oxnard, dried pulp.

"Q. Was a different method of extraction or manufacture of sugar used at Oxnard than was used at Clarksburg during these cropping years?

"A. The method of extracting the sugar and refining it to sugar from sugar beets was identical in

(Deposition of H. E. Zitkowski.)

both plants. In the case of Oxnard, we have an additional process which extracts sugar from molasses, which is not the case at Clarksburg.

“Q. And what is that process called?

“A. The Steffens process.”

The Court: Gentlemen, off the record.

(A discussion was had off the record.)

Mr. Arndt: The third item commences on page 7.

“Q. I will reframe it. During the years 1939, 1940 and 1941, were the growers in Southern California who dealt with Crystal paid for their beets upon a formula in which one of the variables was the average net return secured by the [77] sugar factories in Southern California for the sale of sugar during those particular years?”

Mr. Works: If the court please, that will be objected to as incompetent, irrelevant and immaterial, and not going to prove or disprove any issue in this case as regards the Oxnard operation.

The Court: I am going to reserve my ruling. I want to enable you to protect your record. It may be necessary, to properly protect your record, to make a motion to strike, when this evidence is in, because of immateriality. I am permitting this to go in on the materiality. That is the only objection, isn't it, that you are reserving?

Mr. Works: Yes, that is correct.

The Court: The materiality?

Mr. Works: Yes, Your Honor.

(Deposition of H. E. Zitkowski.)

The Court: As I stated before, I don't know what theory we are finally going to settle on in this case, and so I will have to take all the evidence, receive it, and then try to sift out some method of getting at the truth and the facts. About the only thing I can do now is to receive it.

Mr. Works: The only thing I had in mind——

The Court: Is to protect your record?

Mr. Works: That is correct, Your Honor.

The Court: I don't know whether that will completely protect your record, to have a running objection. I was thinking [78] about that this morning.

Mr. Arndt: I will stipulate.

The Court: I understand your stipulation, but if there is anything substantial, I would like to recommend to both counsel that the way to protect your record is to make a motion to strike, and then my ruling on that will protect you.

Mr. Works: That is fine.

The Court: And in making the motion, refer to the book and page of the transcript.

Mr. Works: And may we have a standing objection to this ?

The Court: As to the Oxnard plant?

Mr. Works: Yes, that is correct, Your Honor. Thank you very much.

Mr. Arndt (Continuing reading):

“A. Yes.

“Q. Now, in determining the net return of Crystal that was used as a part of the average net return,

(Deposition of H. E. Zitkowski.)

was all of the sale of sugar included, or was there an exclusion of this sugar that was refined from this process to which you have referred?

“A. All of the sugar produced at Oxnard entered into the average net return received for sugar which was used as a settlement basis as one of the factors.

“Q. And was that regardless of which process the sugar [79] was extracted by?”

The Court: I thought they said they were both the same process.

Mr. Arndt: Yes. First, they extract sugar by the ordinary process. That produces sugar and molasses.

The Court: I mean in the answer there. I thought his answer was they both used the same process.

Mr. Arndt: No, Your Honor. I will go back.

“Q. Now, in determining the net return of Crystal that was used as a part of the average net return”——

The Court: No, the question before. You asked him about the process at the two plants, the two refineries.

Mr. Arndt:

“A. The method of extracting the sugar and refining it to sugar from sugar beets was identical in both plants. In the case of Oxnard, we have an additional process which extracts sugar from molasses, which is not the case at Clarksburg.”

(Deposition of H. E. Zitkowski.)

I can explain that, Your Honor.

The Court: I understand it. I misunderstood the question. You may proceed.

Mr. Arndt: "A. Correct."

The next is item 4, which starts on page 11.

"Q. Again, that is not what I am asking for. I apparently have not made myself clear. I am not now asking as [80] to the method of determining the formula in the first place. I am referring to the formula as it appeared in the contract. The formula as it appeared in the contract provided for a payment to the grower of certain sums per ton of sugar beets, depending upon the sugar content of his beets and upon the average net return received by Crystal from the sale of the sugar. The question I am asking is whether, in paying the grower, the average net return to the grower included the sale of sugar, or included the sale of sugar and the sale of molasses, pulp, and other by-products.

"A. Included the sale of sugar as far as the buildup of the scale is concerned.

"Q. Then, when the grower was paid, the payment to the grower was determined by the net return of Crystal from the sale of sugar and not from the sale of sugar plus the sale of molasses, pulp and other by-products?

"A. That is correct, as far as the scale is concerned.

"Q. Did the same thing occur in 1939, 1940 and 1941?

"A. Correct."

(Deposition of H. E. Zitkowski.)

The next is item 5, which is on page 14.

“Q. I call your attention to certain inter-company correspondence dated September 12, 1938, which is found at page 24 of the answer to the interrogatories——

“The Witness: Would that be in here?” [81]

“Mr. Graham: I think that is in the original set of answers.

“Mr. Arndt: That is right.

“Q. ——which is a letter from Lester J. Holmes to the Denver office, Attention of H. E. Zitkowski. I call your attention to the first paragraph which refers to someone named George. Who was George?

“A. I think it was George Wilson, a beet grower in the area. I believe that was what was stated in answer to a similar question in one of the interrogatories. It is a possibility it might have been George Holmes, who also was a beet grower in the area, but my thinking is that it was George Wilson. [82]

“Q. Now, I call your attention to the first sentence of the second paragraph of that letter, which reads: ‘In regard to the joint net return, while he hesitated to be critical of it, he was afraid that, due to the larger volume of net sugar that the Spreckels Sugar Company sold, they would attempt to push their cane sales, in which they alone were interested, and ship beet sugar where there was a freight absorption as the growers stood 50 per cent of this freight absorption.’ What is referred to by the expression ‘freight absorption’ ”?

“A. What Mr. Holmes undoubtedly had in mind

(Deposition of H. E. Zitkowski.)

was that the cost of transportation to market would be more than the pickup of freight from some refinery point to this delivery point.

“Q. What delivery point?

“A. Well, wherever Clarksburg sugar might have been delivered to.

“Q. If Clarksburg sugar was shipped to Nevada, was it not sold at a price which would include freight from San Francisco to Nevada?

“A. Let me answer that question this way: I want to make an explanation here that, while I am in general familiar with the methods in which sugar is sold, I have never had charge of the sales policies [83] or the sale of sugar, and I am not competent to answer specifically whether Clarksburg sugar shipped to Nevada would realize the San Francisco price plus the freight from San Francisco to Nevada. There are too many other factors that enter into the delivered price of sugar or the returns that we received from Clarksburg sugar delivered in Nevada.

“In the first place, beet sugar is generally sold at a lesser price than is cane sugar in any given area. There may be some exceptions to that now and then, but there is what the trade calls a differential between the price of beet sugar and cane sugar and, then, there are many other factors that enter into the delivered price of sugar, and someone having had sales experience is better qualified to point out all those variables than I am able.

“Q. Then, when you received this letter from Mr. Holmes which referred to freight absorption,

(Deposition of H. E. Zitkowski.)

did you or did you not know what was meant in the sugar trade by the expression 'freight absorption' at the time you received the letter?

"A. I have a general idea of what it meant, yes.

"Q. Isn't it true that the expression 'freight absorption' has no reference whatsoever to the [84] differential between the price of cane and beet sugar.

"A. Your question was, isn't it true that freight on the San Francisco base price was added and that that established the delivered price of Clarksburg sugar?

"Q. Let us return to the expression 'freight absorption.' Is it not a fact that in September, 1938, at the time this letter was written, at the time you received this letter, when sugar was sold, three possible situations as to freight arose? Either there was a freight absorption, or there was what is commonly called phantom freight, or the amount of freight was paid by the company and was equal to the amount of freight charged the purchaser, isn't that true?

"A. That is probably true, although you should get a sales expert to definitely establish that point.

"Q. In any event, when you received this letter from Mr. Holmes, you did not ask him in any way what he meant by freight absorption?

"A. I don't know that I did, no.

"Q. What is your best recollection?

"A. I don't know that I did.

"Q. Do you mean by that, you don't remember, or you mean as far as you remember you didn't ask him?

(Deposition of H. E. Zitkowski.)

"A. As far as I remember, I didn't ask him.

"Q. Now, then, let us continue in the same sentence [85] where it says, 'as the growers stood 50 per cent of this.' Now, that referred to the freight absorption, didn't it?

"A. It undoubtedly did, yes.

"Q. Would you explain to me how the growers stood 50 per cent of the freight absorption?

"A. Well, the grower is settled for on the basis of the net receipts for sugar by the company, and from the gross receipts are deducted a number of items, including freight paid on sugar. In other words, we sell sugar on a delivered basis and pay the freight to destination. Now, the grower is settled for on the net receipts. Mr. Holmes makes an assumption there that is not quite correct, when he says the grower stood 50 per cent of this. That figure is not necessarily 50 per cent but various sums.

"Q. Would it be a correct statement to say that it is on the average 50 per cent, with certain situations being slightly more than 50 per cent and certain slightly less than 50 per cent?

"A. Generally speaking that is true.

"Q. So that the formulas were so worked out that on the average the growers received 50 per cent of the net return of sugar, and the manufacturer [86] received 50 per cent of the net return of sugar, approximately?

"A. Well, I would want a definition of the word 'approximately.' Some of the returns per ton of

(Deposition of H. E. Zitkowski.)

beets to growers are substantially more than 50 per cent of the receipts for sugar.

“Q. And some were less than 50 per cent?

“A. It is possible.

“Q. Would it be a fair statement to state that the growers received on the average 50 per cent or more of the net return from the sale of sugar?

“A. That is correct.

“Q. And these formulas that were worked out in the contracts were worked out on that basis, is that correct? “A. On what basis?

“Q. The basis of the grower receiving on the average, approximately 50 per cent or more of the net return. “A. Or more, yes.

“Q. So, then, returning to this reference to freight absorption, what Mr. Holmes has, in effect stated, was that since the grower received approximately 50 per cent or more of the net return of sugar and since all freight absorption was deducted from the gross [87] return in determining the net return, therefore the grower, in effect, was paying approximately 50 per cent of the freight absorption.

“A. That is his assumption, undoubtedly.

“Q. Now, was that a correct assumption?

“A. If there was a freight absorption, yes.”

Now, No. 6 starts on page 28:

“Q. Now, in Montana and Colorado in 1939, 1940 and 1941 were any of your purchase contracts with growers based upon the average net return of more than one factory?”

(Deposition of H. E. Zitkowski.)

Mr. Works: That is objected to, Your Honor, as irrelevant and immaterial and not going to prove or disprove any issue in the case. And may we have an extending objection to this line of testimony also?

The Court: Yes. I remember when that question came up in the requests for interrogatories.

I permitted counsel to go into that on the assumption that Mr. Arndt was trying to tie in interstate commerce a little more closely. I don't know what materiality it has. I don't know how it is material, what they did in Montana and Colorado, unless it has something to do with the interstate commerce feature. After all we have growers here in California and as has rather diplomatically been stated this morning, there is certainly an inference of an illegal [88] transaction or a transaction that smirks of illegality and the questions that we are concerned with primarily are whether interstate commerce is involved and the amount of damages if any.

Mr. Works: Here, as I understand it, counsel is merely trying to establish the basis of payment to growers in these other states and it doesn't seem to me that that has anything to do with our problem. That is the basis of my objection.

The Court: I am inclined to agree with you, counsel.

Mr. Arndt: The evidence will show, if the court please, that with the exception of Colorado, no place that Crystal operated did Crystal have a joint return with any other company but that in the one state

(Deposition of H. E. Zitkowski.)

where Holly was present. They had a joint return with Holly Sugar Company in Colorado.

The Court: What will that establish?

Mr. Arndt: Which is the same Holly that was the sugar company involved in northern California and the same Holly Sugar Company that is involved in southern California, so that insofar as Holly is concerned here we have agreements with Holly in Colorado as well as in California.

The Court: What does that prove?

Mr. Arndt: I think inasmuch as Mr. Works still insists that interstate commerce is not involved and that the court has not decided the question, that this is important on that issue. [89]

The Court: How does that tend to prove anything, because they had an agreement with them? Assume it is true that in Colorado they had a similar set of agreements that they had in California and with the same people, what will that prove so far as we are concerned here? In other words, it is the control of the price of sugar or the price that the grower is to receive that we are interested in and the price the grower received in Colorado doesn't tend to prove that the price here was fair or unfair.

Mr. Arndt: Mr. Works has taken the position that it only affected California and therefore interstate commerce is involved. That is his consistent position and he insists the Supreme Court decision means one thing and I insist it means something else.

The Court: I think Mr. Works' position is whether or not we are talking about sugar or about beets. I don't think you contend for a moment that

(Deposition of H. E. Zitkowski.)

your company dealing in sugar is not engaged in interstate commerce?

Mr. Works: Not at all. We sell sugar all over the United States.

The Court: So that sugar from your plants in California may end up in New York or any other place?

Mr. Works: Undoubtedly does.

The Court: But your question on interstate commerce is still back to the narrow question upon which I made my [90] original ruling and which Justice Rutledge felt that I hadn't narrowed it sufficiently.

Mr. Works: Yes.

The Court: In other words, going back now to Mr. Works' position, he still reserves the position that when you are dealing in beets you are not dealing in interstate commerce unless those beets leave the confines of the State of California.

Mr. Works: I would state——

The Court: Isn't that your position?

Mr. Works: I would state it somewhat differently, Your Honor.

The burden is upon the plaintiff of showing what we did in California with reference to the beets; whether a substantial economic effect upon interstate commerce was had.

Now, Mr. Justice Rutledge's opinion as I see it, is simply to this effect, that this agreement—I mean this understanding or whatever it was, is not insulated from the operation of the Sherman Act even though it did involve a farm product if it be shown

(Deposition of H. E. Zitkowski.)

that what was done in Northern California had a substantial economic effect on interstate commerce.

I think that is the whole thing in a nut shell. This case has now become the converse of the Frankfurt Distillery case where you remember the interstate product came into [91] the state and then there were restraints in intrastate distribution. This is the same situation in an opposite way.

Here you have farm products which are processed and the processed product undoubtedly goes into interstate commerce. But it seems to me, Your Honor, that we are here talking about prices paid to growers in Montana and Colorado which has nothing to do with solving the question as to whether this situation in California had a substantial economic effect on interstate commerce. And certainly it has nothing to do with any question of whether these plaintiffs, growers, suffered any damage from what was done in California.

The Court: I think under that theory it is admissible because if it is shown your company was doing the same thing in other areas it would show it to be a widespread practice.

Mr. Works: If Your Honor please, and if I may say so, it is sort of a boot strap situation because the same question would arise if a law suit were filed by a Montana or Colorado grower upon the same theory upon which these law suits are filed. He would have to show that the arrangement in his state had a substantial economic effect upon interstate commerce.

The Court: Well, I will be frank with you gen-

(Deposition of H. E. Zitkowski.)

lemen, if you have to rely upon that to save your hide you are going to lose your hide.

Mr. Works: Well, that may be, Your Honor, but I still [92] submit this line of testimony is immaterial even to what Your Honor has in mind.

The question is whether what we did had that effect and not whether what was done in Colorado and Montana had that effect. That is another law suit or a potential law suit.

The Court: Well, the statute has run against everybody now under these contracts.

Mr. Works: That is why I said "potential." Perhaps it isn't even potential. Let us say it is a similar factual situation and I don't see how it helps Mr. Arndt at all.

The Court: I don't see how it helps him. How much of that is there?

Mr. Arndt: Of this particular thing?

The Court: Yes.

Mr. Arndt: Two and a half pages.

The Court: He can read it more quickly than we can argue it.

Mr. Works: May the objection be reserved, Your Honor?

The Court: Yes.

Mr. Arndt: I think I read the question. The answer is:

"A. Yes.

"Q. Where did that occur?

"A. It occurred in Colorado; it occurred in Colorado, and it occurred in Iowa and Minnesota.

(Deposition of H. E. Zitkowski.)

“Q. Now, in those states—— [93]

“Mr. Graham: Excuse me just a minute. May I have that question read back?”

And the question was read.

“Q. Now, in these instances that you have mentioned where there was an average net return of more than one factory, were those factories owned by more than one company? “A. Yes.

“Q. Where did that occur?

“A. In Colorado.

“Q. Now, what companies were involved in the Colorado contract?

“A. The Holly Sugar Corporation.

“Q. By that do you mean that Holly and Crystal each paid their growers upon the average net return of their factories in Colorado?

“A. That is correct. I beg your pardon. I will have to qualify that some.

“Q. Yes.

“A. The Holly Sugar Corporation had a factory in a different section of the State of Colorado, which wasn't included in this joint net settlement basis with the American Crystal.

“Q. What particular section of Colorado was included? [94]

“A. The northeastern Arkansas Valley. In other words, our Rocky Ford plant was included with the Holly Sugar Corporation's plant in that same valley.

“Q. For what years was that true?

“A. That was true for all years since 1921, although there were some government measures set

(Deposition of H. E. Zitkowski.)

up during the war years, when the sugar nets didn't enter into the settlement for beets, but we started the joint net settlement basis in Colorado in 1921.

"Q. And that continued at least through 1941, is that correct? "A. Yes.

"Q. Now, referring to the balance of Colorado, were the growers paid there upon a joint or single net return, insofar as Crystal was concerned?

"A. Insofar as Crystal was concerned?

"Q. Yes.

"A. We only have this one plant.

"Q. Insofar as Montana, how was it handled?

"A. We only have one plant there.

"Q. Did you pay there on a single return or a joint?

"A. A single. The net receipts for Missoula, Montana, show it. [95]

"Q. I don't remember whether you had sugar refineries in any of the Rocky Mountain or Pacific Coast states other than Montana or Colorado.

"A. We do not have."

The next is item 7, which is on page 34.

"Q. Now, referring to the same letter, page 40 of the answer to the interrogatories, commencing at line 2, the portion which reads: 'A limited tonnage which permits Oxnard at all times to operate to capacity can be shipped from your area,' did that refer to the shipping of sugar beets from the Delta Region of the Sacramento and San Joaquin Rivers to Oxnard? "A. It did.

(Deposition of H. E. Zitkowski.)

“Q. Who determined when such shipments would be made on behalf of the company?

“A. A joint consultation or discussion between our manager at Oxnard, manager at Clarksburg, myself; probably Mr. Wilds, our president, got into the discussions, and there may have been still other gentlemen.”

Item 8 is at page 51.

“Q. Now, I wish to call your attention, Mr. Zitkowski, to a letter of November 6, 1939, from you to Lester J. Holmes, which is found commencing at page 52 of the answers to the interrogatories, and I call your attention to the second paragraph which reads: ‘Concerning the first objection which [96] refers to an average net selling price for the sugar produced in Northern California, I think you yourself understand the principles behind this very thoroughly. The principal objection therein is to obtain as far as this is possible a higher average net receipt for sugar by avoiding as much as possible cutthroat competition, cross-haul of sugar, and other similar practices, all of which tend to depress the receipts of sugar and benefit principally the transportation companies and some of the dealers in sugar, to the detriment of perhaps both the customer and the grower of beets, as well as, of course, the processor of such beets.’ I call your attention to the expression ‘cross-haul of sugar.’ To what did you refer by ‘cross-haul of sugar’?

“A. Well, what I had in mind was sugar from

(Deposition of H. E. Zitkowski.)

some other processor or some other factory than the American Crystal Sugar Company, going by or through or in the neighborhood of Clarksburg, and we, in turn, also, in order to find sufficient of customers to dispose of our crop would have to haul sugar greater distances and behind the production centers of possibly Holly, possibly Spreckels Sugar Company, which, as I intimated, I believe is just to the benefit of the transportation companies.”

Item 9 starts at page 53, the last question.

“Q. Now, then, with reference to the expression ‘cutthroat competition,’ what particular cutthroat competition [97] were you referring to?

“A. Oh, stealing one another’s customers.

“Q. You mean by customers, growers of beets, or just purchasers of sugar?

“A. Purchasers of sugar.

“Q. Now, how would the use of an average net selling price in any way affect the stealing or taking of the other companies’ purchasers of sugar?

“A. I can’t answer how it affected it. As I stated earlier, I am not a sugar sales expert nor authority, and have never had anything to do with the sale of sugar.”

Item 10 is at page 55.

“Q. And when you replied to Mr. Holmes concerning his objection, did you not do it so that he could pass the information on to various growers who raised these objections?

“A. That, undoubtedly, was one of the reasons.

(Deposition of H. E. Zitkowski.)

“Q. What other reason was there?

“A. To allay Mr. Holmes’ own fears or objections.

“Q. Now, in this same letter of November 6, 1939, where it makes reference to a benefit to ‘some of the dealers in sugar,’ what particular dealers in sugar were you referring to when you, in effect, stated that the former system in effect in Central California was to the benefit of the dealers? [98]

“A. Well, if some sugar company made some dealer a special concession below the market, it was to the benefit of the dealer and the detriment of the grower or processor of sugar beets.

“Q. When you referred to the principal objective of this new method of paying in Central California, were you referring to cutting out these special prices to some dealers?

“A. The inferences there, I had nothing to do with sugar sales or the establishment of prices, so I was not speaking from first-hand knowledge.

“Q. Then, when you wrote this letter you were speaking from information given you by someone else in Crystal?

“A. In all probability, that is correct.

“Q. And who was that person or persons?

“A. Well, our sales people and all those that had anything directly to do with our sales policy.

“Q. When you say your sales policy and your sales people, you are referring to the persons who were selling the sugar after it was manufactured into sugar, and the policy in connection with the sale thereof, is that correct?

(Deposition of H. E. Zitkowski.)

“A. That is correct.

“Q. Now, in this letter, in this same paragraph, where it refers to depressing the receipts for sugar and benefits principally the transportation companies, were you there referring to the transportation companies who transported the [99] beets or the transportation companies who transported the sugar?

“A. Sugar is what I had in mind, in all probability.”

The next is on page 78, commencing at the last line.

“Q. Is it true that there were certain growers in the lower San Joaquin Valley who signed contracts with the American Crystal Sugar Company, Oxnard plant, whose farms were very close to the 36th parallel, some immediately north, and some immediately south? A. That's true.

“Q. If we took Central California as being that portion of California which included San Joaquin County, Sacramento County, and counties adjoining those two counties, would that cover the portion of California that entered into contracts with the Clarksburg factory?

“A. Adjoining what two counties?

“Q. San Joaquin and Sacramento.

“A. Yes, that is true.

“Q. Then, in the extreme southern part of the San Joaquin Valley, the growers who there dealt with Crystal, dealt with Crystal's Oxnard factory, is that correct? “A. That is correct.

(Deposition of H. E. Zitkowski.)

“Q. Now, then, in the same portion of the San Joaquin Valley, the southern portion, there were certain growers that dealt with Union Sugar Company, is that correct? [100]

“A. In southern San Joaquin?

“Q. Valley. “A. Valley?

“Q. Yes.

“A. I don't think that is correct.

“Q. Then, the growers who are referred to in the answer to Interrogatory 82-C, which appears at page 194 of the answers, reference is there made to the Union Sugar Company factory at Betteravia, California, which processed beets which were grown in California north of the 36th parallel. Now, where were those beets grown?

“A. In the Salinas Valley.

“Q. In what part of the Salinas Valley?

“A. Up and down that valley.

“Q. But, as far as you know, none of them were grown in the San Joaquin Valley?

“A. I don't know about those years. The Union Sugar Company, at one time, grew some beets in the San Joaquin Valley, but not in the southern or extreme southern portion, as you put it, of the San Joaquin Valley, but whether any growers grew beets for the Union Sugar Company in the San Joaquin Valley in 1939, 1940 or 1941, I can't state from memory.

“Q. Now, as far as you know, did the Union Sugar Company, during the cropping year 1939, 1940 or 1941, buy any [101] beets from beet growers in the San Joaquin or Sacramento delta country?

(Deposition of H. E. Zitkowski.)

“A. I do not know, from my knowledge.

“Q. Is it correct to state that you know of none?

“A. No, I know at one time they grew beets in the San Joaquin Valley, which they subsequently abandoned, but I don't know from memory what year. It was about that period of time.

“Q. Were you, in 1939, 1940 or 1941, a director of the American Crystal Sugar Company?

“A. I think that is correct.

“Q. Now, at that meeting of the board of directors of the American Crystal Sugar Company that you attended, was there any discussion of the change in form of the contract used by Clarksburg factory from the 1938 form, in which there was payment to the growers, based upon the average net return of Crystal alone, to the 1939 form, in which the return was based upon the average of Crystal, Holly and Spreckels?

“A. Well, I can't recall specifically any meeting in 1938 where the subject was discussed, but it is customary for the board to consider the beet purchase agreements, and they probably did in 1938.

“Q. Is there any reference in any minutes of the board to that subject?

“A. There may well be. [102]

“Q. Have you any recollection on the subject?

“A. I believe it is customary for the board to pass resolutions finally approving the beet purchase agreements.

“Q. But, aside from a resolution approving the beet purchase agreements, was there any discussion

(Deposition of H. E. Zitkowski.)

or resolution as to the reasons for the change in method from the single return to the joint?

“A. I can’t recall.”

The next is item 12, which starts at page 82, the last line.

“Q. Now, in answer to Interrogatory 88, which is found at page 195 of the answers to the interrogatories, the answer starts: ‘The idea of determining the price to be paid by processors for sugar beets in part on the basis of average net returns received for sugar sold from more than one factory has an historical basis.’ Was that historical basis there referred to the use of such a method in Southern California and the use in Southern Colorado?

“A. Yes, and elsewhere.

“Q. Had that been used elsewhere by Crystal prior to 1939? “A. Oh, yes, in Colorado.

“Q. I mean, other than Colorado and Southern California.

“A. Joint net with our own plants. [103]

“Q. I am referring to plants of other companies.

“A. Yes.

“Q. Now, did that occur other than in Southern California and in Colorado?

“A. Only in Southern California and Colorado, as far as the American Crystal is concerned.

“Q. When did it start in Southern California?

“A. It dates back to World War No. 1.

“Q. All I asked is when it started.

(Deposition of H. E. Zitkowski.)

“A. I am trying to answer you. The present form of contract in Southern California, I believe, dates back to 1917.

“Q. When you say present form, do you mean the form now in use or the form used in 1939, 1940 and 1941?

“A. Well, I mean the joint net settlement basis.

“Q. Okay. That dates back to when?

“A. 1917.

“Q. Is that still being used in Southern California? “A. No.

“Q. When was it stopped in Southern California?

“A. It stopped with the 1942 crop.

“Q. Now, in answer to this Interrogatory 88, and on page 196, the following appears, commencing at line 1 on page 196: ‘Some time in the fall of 1938 or the winter of 1939, Mr. Herman Zitkowski, Vice-president and General Manager [104] of Crystal, discussed the matter with Mr. Carl Moroney, vice-president of Spreckels Sugar Company, Mr. Carl Fisk of Holly Sugar Corporation, and Mr. Lester J. Holmes, manager of Crystal’s Clarksburg factory.’ Where did that discussion take place?

“A. Well, it is a long time ago. I believe it was at Clarksburg; it may have been in Sacramento.

“Q. Was any memorandum kept of what was said at that time?

“A. No, not that I know of.

“Q. How long was that before the idea was adopted by Crystal? “A. I don’t know.

“Q. Now, was this meeting held before or after

(Deposition of H. E. Zitkowski.)

the returns for 1938 crops had been made public in Northern California?

"A. Oh, it was well before the return from the 1938 crop.

"Q. Was it before or after the returns from the 1937 crop had been made public?

"A. Probably after the returns from the 1937 crop had been made public.

"Q. Now, the returns from the 1937 crop were made public in August, 1938, is that correct?

"A. In August, 1938. [105]

"Q. So, then, you would state that this meeting took place some time after August, 1938?

"A. Yes.

"Q. Now, what was said at this meeting?

"A. As a matter of fact, we, I recall, met with a committee of beet growers, and discussed the proposed joint settlement basis.

"Q. Was this meeting with growers before or after you had this meeting with Mr. Moroney, Mr. Fisk and Mr. Holmes?

"A. It was at the time of the meeting with the growers, when we explained the procedure to a committee of growers.

"Q. Now, before you had this meeting with the committee of growers, did you have any discussion with Mr. Moroney, Mr. Fisk or Mr. Holmes?

"A. Oh, I had frequent discussions with Mr. Moroney. I mean, I met him often.

"Q. I mean, with reference to this idea of de-

(Deposition of H. E. Zitkowski.)

termining the price to be paid on the basis of average net returns.

“A. I don’t recall such other meetings with Mr. Moroney, and I say that for the reason that the matter of sales policy was not determined by me.

“Q. Then, at the time that you attended this meeting with the growers, at which Mr. Moroney and Mr. Fisk and Mr. Holmes were present, the sales department of Crystal had already determined on this new method for 1939, isn’t that correct? [106]

“A. Well, I would say it had recommended that we follow that policy as we did in other territories.

“Q. Now, who told you this decision of the sales department?

“A. Undoubtedly, the president of the company.

“Q. That is, Mr. Wilds?

“A. Mr. Wilds.

“Q. Then, you were told of the decision after the decision had been made by the sales department and approved by Mr. Wilds, is that correct?

“A. I didn’t put it just that way. A recommendation had been made by the sales department, or by the sales policy, which was in frequent discussion, because we had been proceeding on that sort of a method for more than 25 years, or maybe I am wrong about the 25. Since 1917 to 1938; that is 21 years, I guess; and we were doing the same thing in Colorado, and were settling on a joint factory net in our Iowa and southern Minnesota territory, so it was just an accepted condition under which we had been operating for many, many years.

(Deposition of H. E. Zitkowski.)

“Q. So, the Iowa and southern Minnesota territory was based upon factories owned by Crystal and no one else, isn’t that correct?

“A. That is correct. [107]

“Q. Then, at the time this meeting was held with the growers, following August, 1938, the sales department already recommended the joint return contract? “A. That is correct.

“Q. And prior to that meeting, the sales department had already taken the matter up with Spreckels and Holly to see if it was satisfactory to them?

“A. Well, I don’t know who talked with who, or how the approach was made.

“Q. But, in any event, the approach had been made prior to this meeting with the growers?

“A. That is correct, the recommendation had been made prior to the meeting with the growers, and it was our job to inform the growers of the intent and purposes.

“Q. And prior to this meeting with the growers, the okay had been secured from Spreckels and Holly to have this plan go into effect?

“A. Well, the okay; I don’t know what you mean by okay.

“Q. I will put it in a different way. Crystal could not have put this plan into effect unless it was consented to by Holly and Spreckels, isn’t that correct?

“A. I don’t think Crystal initiated the proposal.

“Q. Who initiated it.

“A. I don’t know. [108]

“Q. In any event, it was initiated prior to the

(Deposition of H. E. Zitkowski.)

time of this meeting that you have testified about with the growers? “A. That is right.

“Q. And regardless of who initiated it, it was recommended by the sales department of Crystal and was approved by Holly and Spreckels prior to this meeting with the growers?

“A. It was recommended to us prior to that time.

“Q. When you say ‘to us,’ you mean to Holmes and yourself?

“A. Yes, the operating department.”

Then on page 97 is item 13:

“Q. I don’t think you understand to what I am referring. In the contract for 1938 for Clarksburg, the grower was paid on a formula in which one of the variables was the average net return of Crystal from the sale of sugar. That is correct, isn’t it?

“A. That is correct.

“Q. Now, the gross sales of sugar as shown on the return made to the growers included only the sales from sugar itself and did not include the sales from molasses or pulp, dried or wet, isn’t that correct? “A. That is correct.

“Q. Now, then, were growers in any part of the country, other than California, paid upon a formula on which the sales [109] return from either sugar or something else was one of the elements entering into the price?

“The Witness: Will you read that question?

“(Last question repeated by the reporter.)

“A. I would not call it a formula. The sentence you just read referring to Woodland, a Woodland

(Deposition of H. E. Zitkowski.)

meeting, is a formula, because it assumes an extraction, but there are or were areas in the United States where the net returns from the actual sugar made per ton of beets were divided equally, and that applies also to the net returns for pulp and molasses.

“Q. In what areas did that occur during 1939, 1940 and 1941?

“A. What we call the Michigan area.

“Q. Did that occur in any other area besides the Michigan area?

“A. We speak of the Michigan area as all of that area, Michigan being the center thereof, including Ohio, Indiana and, I believe, Wisconsin, but the principal production is in Michigan.”

Mr. Works: Pardon me. May our standing objection run to these other states, too, Your Honor?

The Court: You may have that standing objection, as I stated before.

Mr. Arndt: “Q. What other areas did Crystal have for [110] the purchasing of beets in 1939, 1940 and 1941? “A. What other areas?

“Q. Other than California, Colorado, Michigan, describing Michigan as you have described it.

“A. We purchased no beets in Michigan. We don't operate in Michigan.

“Q. Then, when you were speaking about the Michigan area, you were speaking of how other companies purchased beets, is that it?

“A. That is correct. I believe that is what your question was.

(Deposition of H. E. Zitkowski.)

“Q. Pardon me. Did Crystal use that method which was used in the Michigan area in any of its purchasing? “A. No, sir.

“Q. Now, do you know any other area of the country other than what you referred to as the Michigan area in which this method was used whereby the growers received half of the net return of the sugar and of the pulp and molasses?

“A. There is a small company in southern Colorado that has two forms of contract, one such as I referred to in the Michigan area and the other identical with our southern Colorado beet purchase contract.

“Q. And what was the name of that company, or is the name?

“A. The National Sugar Manufacturing Company.” [111]

Then we have item 14, which starts at page 112.

“Q. Then, would it be a fair statement to state that, from 1938 through 1945, the efficiency of the Clarksburg plant, insofar as the percentage of sugar extraction was concerned, was approximately constant? “A. Approximately constant.”

That completes the deposition of Mr. Zitkowski.

The Court: Is there going to be any direct evidence from either side in this case as to the whys and wherefores of the change from the 1938 basis to the form of contract in question in this suit?

Mr. Arndt: I have taken the deposition of every officer of the company.

The Court: What I am trying to get at is this. Is there going to be a question of inference, or is there going to be somebody that is going to testify as to what they did it? For instance, in this deposition here, they talk about a growers meeting. What I am naturally interested in is the motive behind the change-over. You have taken these various depositions, but I don't know what is in them. I have just asked the question.

Mr. Arndt: Every person has denied it in connection with Crystal.

The Court: Then why read the depositions?

Mr. Arndt: To show that. I have taken the deposition [112] of every officer, except the chairman of the board, who was in Europe, and I couldn't get him.

Mr. Works: How could you say everybody denied knowing anything about it, when you just read Mr. Zitkowski's testimony of where they met with the growers and discussed the whole thing with them?

Mr. Arndt: I assumed the court was referring to any further testimony than that.

The Court: One of the things I am interested in is when you changed your form of contract, your method of figuring prices, there must have been a reason for it, some economic reason I assume. Is there any direct evidence as to why the change was made in the method of doing business?

Mr. Arndt: Mr. Wilds, in his deposition, gives one explanation.

The Court: Of course, I don't know what these

depositions have in them, but I have another question to ask. You talk about the pulp and molasses as not being included in the receipts at Clarksburg. Did the growers receive that under the 1938 contract?

Mr. Works: No.

Mr. Arndt: No, Your Honor.

The Court: Then it wasn't customary to take that into consideration, was it?

Mr. Works: The American Crystal has never paid off on [113] that basis. I suppose that is taken into consideration in making up the sugar content. It may be that they get a higher percentage because of that.

Mr. Arndt: As a matter of fact, I think they get a lower percentage than they do at Oxnard, where they have the Steffens plant, which does extract the sugar from the molasses. It works just the opposite, Your Honor.

The Court: The point I am making is, as far as the violation of the Antitrust Act is concerned, where is that feature material? That might be a question under your accounting angle, but there is just one change in your contract.

Mr. Arndt: That is right.

The Court: And that is the average, instead of the actual payment. If that plant never paid on that basis, would that be a consideration in this suit? When I say "this suit," I mean the antitrust angle.

Mr. Works: I don't think it has anything to do with the antitrust count, Your Honor.

Mr. Arndt: The evidence will show, your Honor,

that in this section of the Arkansas Valley in Colorado, there were three sugar companies, Holly, Spreckels, and an independent. Holly and Spreckels bought on a joint return. The independent paid on 50 per cent of sugar, molasses and pulp. There, where the independent was competing against the combine, it paid on that basis. [114]

The Court: I know, but that is Colorado.

Mr. Arndt: That is the only place we have the combine operating against an independent.

The Court: The point I am making is this. When you come down to it, the damages of the plaintiff, if any, must be based upon what he would have received, or they would have received, had there not been this agreement.

Mr. Arndt: Yes, your Honor.

The Court: I think in the statement in court before, it was stated the Clarksburg plant was virtually the only desirable outlet for the plaintiffs.

Mr. Arndt: Clarksburg or Oxnard, because probably half our stuff went to Oxnard, as it was.

Mr. Works: You must include Union, which was not in this.

Mr. Arndt: Union was in the Southern California combine. Union only took Salinas during these years. Union was part of the Southern California combine. Union had the joint return in Southern California with the others.

The Court: Well, if they shipped to Oxnard, that was at additional cost.

